274 N.C. App.—No. 3 Pages 251-357

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AUGUST 6, 2021

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

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OF
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[1]Retired 31 December 2020. [2]Appointed Chief Judge 30 December 2020 and sworn in 1 January 2021. [3]Retired 31 December 2020.
[4]Resigned 31 December 2020. [5]Term ended 31 December 2020. [6]Term ended 31 December 2020. [7]Sworn in 1 January 2021.
[8]Sworn in 1 January 2021. [9]Sworn in 1 January 2021. [10]Sworn in 1 January 2021. [11]Appointed 30 December 2020 and sworn in 6 January 2021.

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COURT OF APPEALS

CASES REPORTED

FILED 17 NOVEMBER 2020

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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Criminal—robbery with a dangerous weapon—sufficiency of evidence—The trial court properly denied defendant's motion to dismiss a charge of conspiracy to commit robbery with a dangerous weapon where the evidence permitted a reasonable inference by the jury that defendant conspired with two other people to commit the robbery. Specifically, one of the victims described three individuals threatening him and his wife at gunpoint, defendant shooting him before taking his phone and wallet, and the three individuals fleeing together in defendant's car; additionally, law enforcement apprehended one of the individuals inside the car after it crashed, found the gun along with the stolen items inside the car, and secured surveillance footage of defendant and his girlfriend fleeing from the crash site. **State v. Glenn, 325**.

association and forty homeowners who ratified the restrictions), plaintiff was not estopped under principles of equitable or quasi-estoppel from arguing that the restrictions were extinguished by a foreclosure sale of a senior deed of trust. Although the restrictions gave plaintiff a right of first refusal to purchase residential lots in the subdivision that included plaintiff's property, plaintiff did not assert that the restrictions were still legally effective when it signed waivers of its right to purchase some of those lots; therefore, plaintiff was not taking a position in the lawsuit that was inconsistent with an earlier position. **Home Realty Co. & Ins. Agency, Inc. v. Red Fox Country Club Owners Ass'n, Inc., 258.**

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Relevance—impeachment—witness's civil suit against third party—interest in outcome of defendant's trial—In a prosecution for robbery with a dangerous weapon and other related offenses, the trial court properly sustained the State's objection on relevance grounds when defendant, on cross-examination, asked the victim about a civil lawsuit he filed against the owner of the parking lot where the armed robbery took place (alleging inadequate security), where defendant was identified in the lawsuit as the robber. Because it was unnecessary to prove that defendant was the robber in order to prevail against the parking lot owner in the civil suit, the pendency of that suit did not prove the victim's interest in the outcome of defendant's trial, and therefore was inadmissible to impeach the victim. **State v. Glenn, 325.**

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In-court—due process rights—witness credibility—In a prosecution for robbery with a dangerous weapon and other related offenses, there was no plain error where the trial court did not intervene ex mero motu to exclude the robbery victim's in-court identification of defendant as the perpetrator of the offenses. The identification did not violate defendant's due process rights where nothing indicated that it had been tainted by an "impermissibly suggestive" pre-trial identification procedure. Furthermore, defendant had ample opportunity to test the reliability of the in-court identification by cross-examining the victim about any improper factors that may have influenced him when he identified defendant. **State v. Glenn, 325.**

PUBLIC OFFICERS AND EMPLOYEES

State Health Plan—liens—subject matter jurisdiction—courts—The trial court properly dismissed plaintiffs' motion to reduce the North Carolina State Health Plan's (SHP's) lien on proceeds from a medical malpractice settlement for lack of subject matter jurisdiction (pursuant to Civil Procedure Rule 12(b)(1)) because the SHP is a creature of statute, and neither the state constitution nor the General Statutes confer jurisdiction upon the courts to reduce SHP liens. **Quaicoe v. Moses H. Cone Mem'l Hosp. Operating Corp., 306.**

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SCHEDULE FOR HEARING APPEALS DURING 2021

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks:

January 11 and 25

February 8 and 22

March 8 and 22

April 12 and 26

May 10 and 24

June 7

August 9 and 23

September 6 and 20

October 4 and 18

November 1, 15, and 29

December 13

Opinions will be filed on the first and third Tuesdays of each month.

DUNBAR v. ACME S.

[274 N.C. App. 251 (2020)]

DERRICK DUNBAR, PLAINTIFF
v.
ACME SOUTHERN, EMPLOYER, HARTFORD UNDERWRITERS INSURANCE COMPANY (THE HARTFORD), CARRIER, DEFENDANTS

No. COA19-1153

Filed 17 November 2020

1. Workers' Compensation—last payment—N.C.G.S. § 97-25.1—termination of right to medical compensation—notice of final payment

The Industrial Commission did not err by concluding that, pursuant to N.C.G.S. § 97-25.1, plaintiff was no longer entitled to medical compensation because two years had passed since the employer's last medical payment (which occurred because plaintiff's medical providers had begun billing Medicare instead of the employer's insurer and failed to notify plaintiff of the change). Contrary to plaintiff's argument, section 97-18(h), which requires insurers to send notice when they have made their final payment, was unrelated to section 97-25.1 and inapplicable to plaintiff's case.

2. Workers' Compensation—last payment—N.C.G.S. § 97-25.1—termination of right to medical compensation—equitable estoppel

Where two years had passed since the employer's last medical payment (because plaintiff's medical providers had begun billing Medicare instead of the employer's insurer and failed to notify plaintiff of the change) and the Industrial Commission concluded that, pursuant to N.C.G.S. § 97-25.1, plaintiff was no longer entitled to medical compensation, the Court of Appeals rejected plaintiff's argument that the employer and insurer (defendants) should have been equitably estopped from asserting N.C.G.S. § 97-25.1 as a defense. There was no evidence that the insurer acted in bad faith to induce plaintiff into a false sense of security.

3. Workers' Compensation—last payment—N.C.G.S. § 97-25.1—termination of right to medical compensation—due process

Where two years had passed since the employer's last medical payment (because plaintiff's medical providers had begun billing Medicare instead of the employer's insurer and failed to notify plaintiff of the change) and the Industrial Commission concluded that, pursuant to N.C.G.S. § 97-25.1, plaintiff was no longer entitled to medical compensation, the Court of Appeals rejected plaintiff's

argument that the Workers' Compensation Act unconstitutionally deprived him of his property right to medical compensation. Plaintiff was entitled to medical compensation only as set forth in the Act, and plaintiff lost his right to compensation pursuant to N.C.G.S. § 97-25.1 when two years had passed since the employer's last payment.

Appeal by Plaintiff from Opinion and Award entered 3 September 2019 by Commissioner Charlton L. Allen for the North Carolina Industrial Commission. Heard in the Court of Appeals 23 September 2020.

Seth M. Bernanke for the Plaintiff-Appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and Michael F. Hedgepeth, for Defendants-Appellees.

DILLON, Judge.

Derrick Dunbar ("Plaintiff") was injured in 1998 and received medical compensation from his employer's insurer for over a decade. Plaintiff appeals from an order entered last year by the North Carolina Industrial Commission (the "Commission") in which the Commission concluded that Plaintiff was no longer entitled to medical compensation for that injury. The Commission based its determination on the fact that no claim had been made to the insurer for medical compensation for over two years. For the reasoning explained below, we affirm.

I. Factual and Procedural Background

In 1998, Plaintiff was injured in a workplace accident. He entered into a settlement agreement with his employer, Defendants Acme Southern, Inc., and the employer's insurer, Hartford Underwriters Insurance Company ("Hartford") as to Plaintiff's *indemnity* compensation. However, the parties did not reach a settlement agreement as to Plaintiff's *medical* compensation.

While Plaintiff's claim for medical compensation remained pending, Plaintiff's medical providers billed Hartford for Plaintiff's medical treatment related to his injuries, and Hartford paid the submitted bills.

However, sometime around 2013, Plaintiff's medical providers began billing Medicare for reimbursement rather than billing Hartford. Neither Plaintiff nor Hartford knew of this change in billing by the medical providers, so Plaintiff was unaware that Hartford was no longer paying for his medical treatment, and Hartford was unaware that Plaintiff

continued to receive medical treatment. Hartford made no payments for Plaintiff's treatment after October 2013.

In 2017, Plaintiff was referred to a medical provider for pain management. He sought authorization from Defendants for this treatment, which was denied. Therefore, on 15 February 2018, more than four years after Hartford last paid any medical compensation for Plaintiff's 1998 injuries, Plaintiff filed a request with the Commission for a hearing to determine whether he was entitled to further medical compensation from Defendants.

After a hearing on the matter, a deputy commissioner concluded that Plaintiff was not entitled to continued medical compensation because he had not submitted a request for more than two years since Hartford's last payment. Plaintiff appealed to the Full Commission, which affirmed the deputy commissioner's ruling. Plaintiff timely appeals. After careful review, we affirm.

II. Analysis

Plaintiff makes several arguments on appeal, which we address in turn.

A. Notice Requirement

[1] Plaintiff's main argument is that his claim should not be barred by the fact that Hartford did not make any payments for his medical compensation for a two-year period.

The issue presented by Plaintiff is one of statutory construction, which, as a question of law, we review *de novo*. *Wood v. J.P. Stevens & Co.*, 297 N.C. 636, 642, 256 S.E.2d 692, 696 (1979) (recognizing that "the construction of a statute is ultimately a question of law for the courts"). Specifically, Plaintiff's argument concerns the interplay of two statutes – Section 97-25.1 and Section 97-18(h) – both which are part of our Workers' Compensation Act (the "Act").

The Commission denied Plaintiff's claim based on N.C. Gen. Stat. Section 97-25.1, which provides that "[t]he right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless" the employee's right to further compensation is preserved in one of two ways, neither of which apply in the present case. N.C. Gen. Stat. § 97-25.1 (2018).[1]

1. Specifically, Section 97-25.1 provides that an employee's right to further medical compensation may be preserved, notwithstanding any payments being made in a two year period if, within the two year period, either (1) "the employee files with the Commission

In the present case, Hartford last made a payment for Plaintiff's medical compensation in October 2013, after it received its last bill from Plaintiff's medical provider.[2] The parties stipulate that Plaintiff was not aware that Hartford was no longer being billed after October 2013 for his care.

Plaintiff argues, though, that Section 97-25.1 should be read *in pari materia* with Section 97-18(h), which requires an insurer that provides coverage to an injured employee to promptly notify the employee and the Commission when it has made its "final" payment. This Section further provides that the failure by the insurer to provide this required notice will result in a $25.00 penalty, to be paid to the Commission. Specifically, Section 97-18(h) provides that

> Within 16 days after final payment of compensation has been made, the employer or insurer shall send to the Commission and the employee a notice . . . stating that such final payment has been made . . . . If the employer or insurer fails to so notify the Commission or the employee within such time, the Commission shall assess against such employer or insurer a civil penalty in the amount of twenty-five dollars ($25.00). . . .

N.C. Gen. Stat. § 97-18(h).

Specifically, Plaintiff argues that Hartford should not be deemed to have made its "last" payment under Section 97-25.1, thus starting the two-year clock, unless and until Hartford provided notice to Plaintiff that it had made its "final" payment under Section 97-18(h). We disagree.

Our Supreme Court has provided five guides for courts when construing the Act, imploring that the Act should be construed liberally, but that a court should not engage in "judicial legislation" by enlarging coverage beyond the plain meaning of the terms used by our General Assembly:

> First, the Workers' Compensation Act should be liberally construed, whenever appropriate, so that benefits will not

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an application for additional medical compensation which is thereafter approved by the Commission" or (2) "the Commission on its own motion orders additional medical compensation." N.C. Gen. Stat. § 97-25.1.

2. There is no indication that any payment was made towards Plaintiff's indemnity compensation claim after 2013, as Plaintiff's claim for indemnity compensation was settled in 2003.

> be denied upon mere technicalities or strained and narrow interpretations of its provisions.
>
> Second, such liberality should not, however, extend beyond the clearly expressed language of those provisions, and our courts may not enlarge the ordinary meaning of the terms used by the legislature or engage in any method of "judicial legislation."
>
> Third, *it is not reasonable* to assume that the legislature would leave an important matter regarding the administration of the Act open to inference or speculation; consequently, the judiciary should avoid ingrafting upon a law something that has been omitted, which it believes ought to have been embraced.
>
> Fourth, in all cases of doubt, the intent of the legislature regarding the operation or application of a particular provision is to be discerned from a consideration of the Act as a whole — its language, purposes and spirit.
>
> Fifth, and finally, the Industrial Commission's legal interpretation of a particular provision is persuasive, although not binding, and should be accorded some weight on appeal and not idly cast aside, since that administrative body hears and decides all questions arising under the Act in the first instance.

Deese v. Southeastern Law and Tree Expert Co., 306 N.C. 275, 277-78, 293 S.E.2d 140, 142-43 (1982) (emphasis added) (citations and quotation marks omitted).

Applying *Deese*, we conclude that the notice requirement in Section 97-18(h) regarding a "final payment" is unrelated to the two-year provision in Section 97-25.1 regarding a "last payment."

The plain language of Section 97-25.1 bars compensation beyond the two-year period following the last payment of either medical or indemnity compensation, and contains no language suggesting that any "notice" is a condition to the accrual of the limitation period. Our appellate courts have always construed the term "last payment" as the date of the last actual payment made by the insurer (or employer). *See Busque v. Mid-America Apartment Cmtys.*, 209 N.C. App. 696, 707, 707 S.E.2d 692, 700 (2011) (determining that the "last payment" was the most recent payment that was issued to the injured party); *Harrison v. Gemma Power Sys., LLC*, No. COA13-1358, 2014 WL 2993853, at *4

(N.C. Ct. App. July 1, 2014) (unpublished) (defining "last payment" as the "the most recent payment of medical or indemnity benefits that has actually been paid"). Section 97-18(h) does not refer to the "last" payment, but rather the "final" payment.

Further, Section 97-18(h) plainly states the appropriate sanction for failing to provide a required notice of a "final" payment is a nominal civil fine. Had the General Assembly intended that providing notice under Section 97-18(h) was a condition to bar future claims under Section 97-25.1, that body would have said so: "the legislature would [not] leave [this] important matter . . . open to inference or speculation[.]" *Deese*, 306 N.C. at 278, 293 S.E.2d at 143. We are further persuaded by the holding of our Court in *Hunter v. Perquimans County Board of Education* that the failure to provide notice when required by Section 97-18(h) has no impact on the operation of the limitations period for termination of indemnity compensation under Section 97-47. 139 N.C. App. 352, 357, 533 S.E.2d 562, 566 (2000) (stating that "the Form 28B notice required by N.C. Gen. Stat. § 97-18(h) is actually a reminder and not a notification. Neither our General Assembly nor our case law has interpreted an employer's failure to file such notice as providing an employee with a right to remedy." (citation omitted)).

In any event, Section 97-18(h) does not apply in this case. There is no way Hartford could have known within 16 days of providing coverage in October 2013 that this payment would be the last payment Plaintiff would have sought.

B. Estoppel

[2] Plaintiff argues that even if his claim for further compensation is barred by Section 97-25.1, Defendants should be equitably estopped from asserting this Section as a defense in this case. On the facts of this case, we disagree.

Plaintiff points to no evidence that Hartford was aware that Plaintiff was continuing to incur medical expenses after October 2013. There is no indication that Hartford acted in bad faith or acted in any way to induce Plaintiff into a false sense of security regarding its willingness to continue providing medical compensation. Therefore, we hold that Plaintiff's estoppel argument fails.

While our courts have recognized that equitable doctrines are available in workers' compensation cases, we express no view as to whether estoppel would ever apply with respect to Section 97-25.1. *See Biddix v. Rex Mills, Inc.*, 237 N.C. 660, 665, 75 S.E.2d 777, 781 (1953); *Daugherty*

v. Cherry Hospital, 195 N.C. App. 97, 102, 670 S.E.2d 915, 919 (2009). It could be argued that estoppel should apply where an insurer was continuing to be billed but was not making payments, though acting in a way to suggest that they would make said payments. But such is not the case here. Our holding is limited to situations where the two-year gap was caused by the fact that the insurer was not being billed.

C. Due Process

[3] Plaintiff contends that if the Act does not require that Defendants provide Plaintiff with notice, the Act then violates our North Carolina Constitution by unfairly taking away Plaintiff's property right to medical compensation.

Notice is a due process consideration, required under the Fourteenth Amendment to the United States Constitution and article 1, Section 19 of the state constitution. *City of Randleman v. Hinshaw*, 267 N.C. 136, 139-40, 147 S.E.2d 902, 904-05 (1966). "No person shall be . . . deprived of his life, liberty, or property, but by the law of the land." N.C. CONST. art. I, § 19. "Procedural due process protection ensures that when government action deprives a person of life, liberty, or property . . . that action is implemented in a fair manner." *State v. Thompson*, 349 N.C. 483, 491, 508 S.E.2d 277, 282 (1998) (quotation marks omitted) (citing *U.S. v. Salerno*, 481 U.S. 739, 746 (1987); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). With procedural due process questions, this Court must first "determine whether there exists a liberty or property interest which has been interfered with by the State . . ." *In re W.B.M.*, 202 N.C. App. 606, 615, 690 S.E.2d 41, 48 (2010) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 571 (1972)).

Here, the Act does not deprive Plaintiff of an existing liberty or property interest or of a "vested right." Plaintiff is only entitled to medical compensation as far as the Act defines the scope of that compensation. Section 97-25.1 states that a plaintiff is no longer entitled to compensation after two years have passed since the employer's last payment. Once that period expires, the property interest terminates.

The statute itself also provides Plaintiff with notice of termination of the right to medical compensation because "[a]ll citizens are presumptively charged with knowledge of the law." *Atkins v. Parker*, 472 U.S. 115, 130 (1985). For these reasons, the Act does not violate Plaintiff's due process rights.[3]

3. Based on our holding, we need not address Defendants' argument concerning the Commission's failure to find that Plaintiff knew of Defendants' termination of payments.

IV. Conclusion

We conclude that the Commission did not err in determining that Plaintiff was not entitled to further medical compensation where more than two years elapsed since Defendants last made a compensation payment, notwithstanding that Defendants never provided notice that its last payment would be the "final" payment. We further conclude that neither Plaintiff's vested rights nor constitutional rights were violated by the Commission's order.

AFFIRMED.

Judges INMAN and YOUNG concur.

HOME REALTY CO. & INSURANCE AGENCY, INC.,
A NORTH CAROLINA CORPORATION, PLAINTIFF
v.
RED FOX COUNTRY CLUB OWNERS ASSOCIATION, INC., A NORTH CAROLINA NONPROFIT CORPORATION; ET AL., DEFENDANTS

No. COA20-125

Filed 17 November 2020

1. Civil Procedure—motion for judgment on the pleadings—conversion to motion for summary judgment—no matters outside pleadings

In a quiet title action, the trial court did not err by declining to treat plaintiff's motion for judgment on the pleadings as a motion for summary judgment pursuant to Civil Procedure Rule 12(c). Although defendants presented affidavits and exhibits with their legal briefs, which constituted "matters outside the pleadings," the order granting plaintiff's motion stated that the court only considered the pleadings, arguments made by counsel, and the applicable law; therefore, plaintiff's motion for judgment on the pleadings never converted into one for summary judgment.

2. Deeds—quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust

In plaintiff's action seeking to quiet title property with a golf course, where a prior owner recorded land restrictions for the property in 1986 that benefitted defendants (a country club owners'

association and forty homeowners who ratified the restrictions), plaintiff was entitled to judgment as a matter of law that the restrictions were extinguished by a foreclosure sale in 1990 of a senior deed of trust recorded in 1984, and therefore the trial court properly granted plaintiff's motion for judgment on the pleadings. Contrary to defendants' argument, the 1986 restrictions did not reattach to the property when plaintiff bought it at a second foreclosure sale on another deed of trust, which was recorded after the restrictions were recorded.

3. Deeds—quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust—failure to plead affirmative defense

In plaintiff's action seeking to quiet title property with a golf course, where the trial court granted plaintiff's motion for judgment on the pleadings after finding that certain land restrictions encumbering the property and benefitting defendants (a country club owners' association and forty homeowners who ratified the restrictions) had been extinguished by a foreclosure sale of a senior deed of trust, defendants could not argue on appeal that the foreclosure proceedings were void as to them because they were not given notice of the proceedings pursuant to N.C.G.S. § 45-21.16. This argument constituted an affirmative defense, which defendants waived by failing to raise it in their pleadings, as required under Civil Procedure Rule 8(c).

4. Deeds—quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust—effect on ratifying homeowners

In plaintiff's action seeking to quiet title property with a golf course, where a prior owner recorded land restrictions for the property in 1986 benefitting forty homeowners who ratified the restrictions (defendants), the trial court correctly found that the restrictions were extinguished by a foreclosure sale in 1990 of a senior deed of trust recorded in 1984, and therefore defendants were no longer entitled to any rights in the property arising from those restrictions.

5. Deeds—quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust—equitable exception

In plaintiff's action seeking to quiet title property with a golf course, where the trial court granted plaintiff's motion for judgment on the pleadings after finding that certain land restrictions encumbering the property and benefitting defendants (a country club

owners' association and forty homeowners who ratified the restrictions) had been extinguished by a foreclosure sale of a senior deed of trust, the equitable exception to the rule of extinguishment by foreclosure set forth in *Dixieland Realty Co. v. Wysor*, 272 N.C. 172 (1967), was inapplicable to the facts of this case. The exception only applies in cases where a trustor purchases his or her own secured property at a senior mortgage sale following foreclosure.

6. Estoppel—quiet title action—land restrictions—extinguished by foreclosure of senior deed of trust—equitable estoppel—quasi-estoppel

In plaintiff's action seeking to quiet title property with a golf course, where a prior owner recorded land restrictions for the property that benefitted defendants (a country club owners' association and forty homeowners who ratified the restrictions), plaintiff was not estopped under principles of equitable or quasi-estoppel from arguing that the restrictions were extinguished by a foreclosure sale of a senior deed of trust. Although the restrictions gave plaintiff a right of first refusal to purchase residential lots in the subdivision that included plaintiff's property, plaintiff did not assert that the restrictions were still legally effective when it signed waivers of its right to purchase some of those lots; therefore, plaintiff was not taking a position in the lawsuit that was inconsistent with an earlier position.

7. Easements—by estoppel—in a golf course—representations in marketing materials—no legally cognizable claim

In plaintiff's action seeking to quiet title property with a golf course, which was part of a subdivision including residential lots and a country club, the trial court properly dismissed a claim by defendants (a country club owners' association and forty homeowners) seeking a declaratory judgment that the property could only be used as a golf course, because North Carolina law does not recognize the creation of an easement by estoppel based on representations in marketing materials, and therefore plaintiff did not grant defendants an easement by estoppel when it sold lots in the subdivision based on marketing materials depicting unrecorded plats with a golf course and describing the lots as part of a golf course community.

8. Easements—by plat—in a golf course—subdivision plats—inadequate description of property boundaries

In plaintiff's action seeking to quiet title property with a golf course, which was part of a subdivision including residential lots and a country club, the trial court properly concluded that defendants (a

country club owners' association and forty homeowners) were not entitled to an easement-by-plat restricting the use of the property to a golf course because the subdivision plats did not adequately describe the golf course's outer boundaries and, therefore, did not create such an easement.

Appeal by Defendants from order entered 2 December 2019 by Judge Robert C. Ervin in Polk County Superior Court. Heard in the Court of Appeals 11 August 2020.

Offit Kurman, P.A., by Robert B. McNeill, for Plaintiff-Appellee.

Erwin, Bishop, Capitano & Moss, P.A., by Fenton T. Erwin, Jr., for Defendants-Appellants.

COLLINS, Judge.

Red Fox Country Club Owners Association and homeowners in the Red Fox Community in Polk County (collectively "Defendants") appeal from an order entering judgment on the pleadings in favor of Home Realty Co. & Insurance Agency, Inc. ("Plaintiff"), the owner of property generally known as the Red Fox Country Club Golf Course ("the Property"). Defendants argue that the trial court erred by granting judgment on the pleadings in favor of Plaintiff and by dismissing Defendants' counterclaims with prejudice. We affirm the order.

I. Procedural History

Plaintiff filed a complaint on 8 February 2018 in Polk County Superior Court seeking to quiet title to the Property and requesting a declaratory judgment that restrictions recorded in 1986 had been extinguished by a foreclosure in 1990, and were no longer in force to encumber or restrict the Property. Plaintiff filed an amended complaint in April. Defendants filed an answer, defenses, and counterclaims in June. Plaintiff filed a motion to dismiss, answer, and affirmative defenses in August. Defendants filed an amended answer, defenses, and counterclaims in March 2019. Plaintiff filed a motion to dismiss, reply to counterclaims, and affirmative defenses in May.

In July 2019, Plaintiff filed a motion for judgment on the pleadings, followed by a memorandum of law supporting the motion, with exhibits. In September, Defendants filed a memorandum of law opposing the motion, with affidavits and exhibits. Plaintiff filed a reply brief in

October. After conducting a hearing on the motion on 8 November 2019, the trial court entered an order on 2 December 2019 granting Plaintiff's motion for judgment on the pleadings and dismissing Defendants' counterclaims with prejudice. Defendants timely filed notice of appeal.

II. Factual Background

In 1966, Charles Dooley and Robert Ernst conveyed 582.29 acres of property, which included 231.20 acres upon which Red Fox Country Club Golf Course was operating, to Tryon Development Company ("Tryon"). Ten days later, Tryon recorded restrictive covenants in the Polk County Register of Deeds,[1] governing a subdivision called Red Fox Run ("1966 Restrictions"). Tryon also recorded plats depicting sections A, B, C, D, E, and H of the subdivision. The 1966 Restrictions did not purport to apply to the remaining acreage that included the golf course.

After 37 lots had been sold, Tryon severed 231.20 acres—the Property that contained the golf course—from the original 582.29-acre tract and conveyed it, as well as another tract, to Red Fox Properties, Inc., by two deeds recorded on 14 July 1971.

Red Fox Properties, Inc., conveyed both tracts to Capstone Development Company ("Capstone") by two deeds recorded on 4 October 1983. The deed to the tract that did not include the golf course explicitly excluded the 70 lots that had been sold by that time.

Capstone executed and recorded on 27 June 1984 a deed of trust that encumbered the Property[2] in the amount of $2,600,000 to William Miller, as trustee for Adrian Hooper ("Hooper deed of trust"). In February 1986, Capstone transferred the Property to Red Fox, Ltd.

On 23 December 1986, Red Fox, Ltd., recorded Amended & Restated Restrictions for Red Fox Country Club and Provisions for Red Fox Country Club Owners Association ("1986 Restrictions"). The 1986 Restrictions pertained to the Property acquired from Capstone and the properties of 40 homeowners who ratified the 1986 Restrictions. The 1986 Restrictions created a Red Fox Country Club Owners Association ("the Association") and stated in part that the "Recreational Amenities shall be conveyed to the Association as Common Properties upon the

1. All recordings referred to herein were filed in this office.

2. While this deed of trust and the subsequent encumbrances and conveyances referred to herein also applied to the tract of property that did not contain the golf course, we refer hereinafter to the Property only, as the other tract is not relevant in this case.

sale of ninety (90%) percent of the Participating Membership in Red Fox Country Club but not later than January 1, 1996."

At 11:00 on 30 December 1986, Red Fox, Ltd., recorded a deed conveying the Property it had acquired from Capstone to Red Fox Limited Partnership. At 11:10 on 30 December 1986, Red Fox Limited Partnership recorded a deed of trust encumbering the Property as collateral for a note in the amount of $3,000,000 to North Carolina Federal Savings & Loan Association ("NCFS&L deed of trust"). At 11:15 on 30 December 1986, the trustee for the 27 June 1984 Hooper deed of trust recorded a subordination agreement, wherein the trustee subordinated the lien created by the Hooper deed of trust to the lien created by the NCFS&L deed of trust.

On 20 February 1990, the substitute trustee for the Hooper deed of trust commenced foreclosure proceedings and served notice on Red Fox Limited Partnership, Capstone, and the District Director for the Internal Revenue Service. Adrian Hooper purchased the Property at the foreclosure sale and assigned the bid to RF Acquisition Co., Inc. ("RF Acquisition"), an entity of which he was President. On 19 June 1990, the substitute trustee conveyed the Property via trustee's deed to RF Acquisition. The substitute trustee filed a Final Report and Account of the sale, which the clerk of superior court audited and approved.

On 2 March 1992, the substitute trustee for the NCFS&L deed of trust commenced foreclosure proceedings. After conducting the sale of the Property, the substitute trustee filed a Final Report of Sale, which the clerk of superior court audited and approved. The substitute trustee conveyed the Property on 14 May 1992 to Resolution Trust Corporation, Receiver for NCFS&L. The deed was recorded on 15 June 1992. The substitute trustee filed a Final Report of Sale, which the clerk of superior court audited and approved. Resolution Trust Corporation conveyed the Property to Plaintiff by a deed recorded on 5 August 1992.

III. Discussion

Defendants argue that the trial court erred by: (1) failing to treat Plaintiff's motion for judgment on the pleadings as one for summary judgment because the trial court considered matters outside the pleadings; (2) entering judgment on the pleadings in favor of Plaintiff, because the foreclosure by power of sale on the Hooper deed of trust was not properly conducted; (3) holding as a matter of law that the 1986 Restrictions were extinguished as to the 40 property owners who had ratified them; and (4) dismissing with prejudice Defendants' counterclaims.

A. Matters Outside the Pleadings

[1] Defendants argue that the trial court erred by failing to treat Plaintiff's motion for judgment on the pleadings as a motion for summary judgment. Defendants contend that when the trial court considered the arguments of counsel, it necessarily considered affidavits and exhibits attached to the parties' respective memoranda of law and brief, which constituted matters outside the pleadings.

Rule 12(c) of the North Carolina Rules of Civil Procedure provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to *and not excluded* by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(c) (2019) (emphasis added).

This provision sets forth a procedure analogous to the conversion of a motion to dismiss under Rule 12(b)(6) to a motion for summary judgment. *See* 5C Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1371 (3d ed. 2020) (citing Fed. R. Civ. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.")).

With respect to both motions to dismiss and motions for judgment on the pleadings, the trial court is vested with discretion to choose whether to consider materials outside the pleadings submitted in support of or in opposition to those motions. *See id.* §§ 1366, 1371. *See also McBurney v. Cuccinelli*, 616 F.3d 393, 410 (4th Cir. 2010) ("[A] judge need not convert a motion to dismiss into a motion for summary judgment as long as he or she does not consider matters outside the pleadings. . . . [N]ot considering such matters is the functional equivalent of excluding them—there is no more formal step required." (internal quotation marks and citation omitted)).

Documents attached to and incorporated within a complaint become part of the complaint. *Weaver v. Saint Joseph of the Pines, Inc.*, 187 N.C. App. 198, 204, 652 S.E.2d 701, 707 (2007). "They may, therefore, be considered in connection with a Rule 12(b)(6) or 12(c) motion

without converting it into a motion for summary judgment." *Id.* (citation omitted). "[I]n the event that the matters outside the pleadings considered by the trial court consist only of briefs and arguments of counsel, the trial court need not convert the motion into one for summary judgment." *Steele v. Bowden*, 238 N.C. App. 566, 573, 768 S.E.2d 47, 54 (2014) (internal quotation marks, brackets, and citation omitted).

In determining whether a trial court considered matters outside the pleadings when entering judgment on the pleadings, reviewing courts have looked to cues in the trial court's order. *See Davis v. Durham Mental Health*, 165 N.C. App. 100, 105, 598 S.E.2d 237, 241 (2004) (motion for judgment on the pleadings was not converted into motion for summary judgment, even though plaintiff presented at least three documents to the trial court, where the order stated, "[b]ased upon the pleadings and the arguments of counsel, the Court finds that Defendant is entitled to entry of a judgment in its favor based on the pleadings"); *Privette v. Univ. of N.C. at Chapel Hill*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989) (Rule 12 motion was not converted into a Rule 56 motion where affidavits were introduced to support the motion, because "the trial court specifically stated in its order that for the purposes of the Rule 12 motion, it considered only the amended complaint, memoranda submitted on behalf of the parties[,] and arguments of counsel").

In this case, the trial court stated in its order granting Plaintiff's motion for judgment on the pleadings:

> The Court considered the pleadings, the arguments of counsel, and applicable law, and determined that Plaintiff's Motion for Judgment on the Pleadings should be granted.

As in *Davis* and *Privette*, the order indicates that the trial court considered the pleadings, the arguments of counsel, and applicable law. Notably, it does not state that the trial court considered Defendants' affidavits or exhibits that would appropriately have been considered on a motion for summary judgment. Additionally, nothing in the record indicates that the trial court considered matters beyond the pleadings, the arguments of counsel, and the applicable law. Accordingly, although the affidavits and exhibits were *presented* to the trial court, they were *excluded* by the trial court, and the motion was therefore not converted into one for summary judgment. *See McBurney*, 616 F.3d at 410.

B. Judgment on the Pleadings

[2] Defendants argue that the trial court erred by entering judgment on the pleadings in favor of Plaintiff because the trial court failed to

consider genuine issues of fact in dispute, and Plaintiff is not entitled to judgment as a matter of law. Defendants specifically assert that the foreclosure proceedings on the Hooper deed of trust were defective as a matter of law.

This Court reviews a trial court's order granting a motion for judgment on the pleadings de novo. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005). Under a de novo review, we "may freely substitute our judgment for that of the trial court." *Carteret County v. Kendall*, 231 N.C. App. 534, 536, 752 S.E.2d 764, 765 (2014) (internal quotation marks, brackets, and citation omitted).

"A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974) (citations omitted). The movant must show that no material issues of fact exist and that the movant is entitled to judgment as a matter of law. *Id.*

> The trial court is required to view the facts and permissible inferences in the light most favorable to the nonmoving party. All well pleaded factual allegations in the nonmoving party's pleadings are taken as true and all contravening assertions in the movant's pleadings are taken as false. All allegations in the nonmovant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial, are deemed admitted by the movant for purposes of the motion.

Id. (citations omitted).

"[I]nstruments registered in the office of the register of deeds shall have priority based on the order of registration . . . ." N.C. Gen. Stat. § 47-20 (2019). Generally, "[t]itle acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights." *St. Louis Union Tr. Co. v. Foster*, 211 N.C. 331, 344, 190 S.E. 522, 530 (1937) (quoting 3 *Jones on Mortgages* 623 (8th ed.)). "Ordinarily, all encumbrances and liens which the mortgagor or trustor imposed on the property subsequent to the execution and recording of the senior mortgage or deed of trust will be extinguished by sale under foreclosure of the senior instrument." *Dixieland Realty Co. v. Wysor*, 272 N.C. 172, 175, 158 S.E.2d 7, 10 (1967) (citation omitted). *See also Dunn v. Oettinger Bros.*, 148 N.C. 276, 282, 61 S.E. 679, 681 (1908) ("A sale under a mortgage or deed of trust . . . cuts out and extinguishes all liens, encumbrances[,]

and junior mortgages executed subsequent to the mortgage containing the power." (internal quotation marks and citation omitted)).

In this case, the Hooper deed of trust that encumbered the Property in the amount of $2,600,000 was recorded on 27 June 1984. In February 1986, Capstone transferred the Property to Red Fox, Ltd. On 23 December 1986, Red Fox, Ltd., recorded the 1986 Restrictions. Accordingly, title acquired by RF Acquisition to the Property upon the foreclosure on the Hooper deed of trust related back to 27 June 1984 and extinguished the 1986 Restrictions.

Defendants seem to argue in their reply brief that, because Plaintiff purchased the Property at a second foreclosure sale on the NCFS&L deed of trust, which was recorded after the 1986 Restrictions, that this sequence of events should cause us to disregard the extinguishment of the 1986 Restrictions by the prior Hooper foreclosure. Defendants cite no authority to support this argument, and our own research reveals no authority supporting a theory that, after the 1986 Restrictions were extinguished as to the Property by the Hooper foreclosure, the benefits and burdens created by the 1986 Restrictions were resurrected with respect to the Property and reattached to the Property when it was later conveyed at the foreclosure sale on the NCFS&L deed of trust.

While the record shows the trustee for the 27 June 1984 Hooper deed of trust recorded a subordination agreement at 11:15 on 30 December 1986, which subordinated the Hooper deed of trust lien to the lien created by the NCFS&L deed of trust, that instrument did not waive the priority of the 27 June 1984 Hooper deed of trust over the Amended & Restated Restrictions subsequently recorded by Red Fox, Ltd., on 23 December 1986. N.C. Gen. Stat. § 47-20 ("Instruments registered in the office of the register of deeds shall have priority based on the order of registration . . . .").

1. Notice

[3] Defendants argue that the foreclosure proceedings on the Hooper deed of trust did not extinguish the 1986 Restrictions because the proceedings were defective as a matter of law. Defendants specifically argue that the proceedings were void as to them because they were not given notice of the proceedings pursuant to N.C. Gen. Stat. § 45-21.16(b).

At the time of the foreclosure proceedings instituted on 20 February 1990, the relevant portion of N.C. Gen. Stat. § 45-21.16(b) required notice of the hearing be given to

> [e]very record owner of the real estate whose interest is of record in the county where the real property is located at the time of giving notice. The term "record owner" means any person owning a present or future interest of record in the real property which interest would be affected by the foreclosure proceeding . . . .

N.C. Gen. Stat. § 45-21.16(b)(3) (1991).

Defendants contend that they were record owners entitled to notice because they had a future interest in the Property by virtue of the terms of the 1986 Restrictions. Specifically, Defendants assert that by the terms of the 1986 Restrictions, (a) the Association, of which each property owner was a member, was created; and (b) Red Fox, Ltd., as the owner of the Property, committed to convey "Recreational Amenities . . . to the Association as Common Properties upon the sale of ninety (90%) percent of the Participating Membership in Red Fox Country Club but not later than January 1, 1996." This commitment to convey the Property, Defendants argue, created a future interest in real property in the Association and its members. Defendants contend that it was Plaintiff's burden to "prove that the foreclosure sale met the requirements of law then in effect in order to apply any principles of law that arise out of the foreclosure," and that "[i]t was not necessary for Defendants to plead in their Answer the 'lack of notice.'"

While Plaintiff argues in response that Defendants were not record owners entitled to notice under the statute, Plaintiff contends that Defendants are barred from relying on this unpled affirmative defense to defeat Plaintiff's motion for judgment on the pleadings. We agree with Plaintiff.

"In pleading to a preceding pleading, a party shall set forth affirmatively . . . any . . . matter constituting an avoidance or affirmative defense." N.C. Gen. Stat. § 1A-1, Rule 8(c) (2019). "Such pleading shall contain a short and plain statement of any matter constituting an avoidance or affirmative defense sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved." *Id.* "Failure to raise an affirmative defense in the pleadings generally results in a waiver thereof." *Robinson v. Powell*, 348 N.C. 562, 566, 500 S.E.2d 714, 717 (1998) (citation omitted).

While our state courts have not directly addressed whether the failure to serve notice under N.C. Gen. Stat. § 45-21.16 is an affirmative defense, a United States District Court in North Carolina analyzed

a factually similar case under North Carolina law and concluded that "it is clear that the defense set forth in [N.C. Gen. Stat.] § 45-21.16 constitutes an affirmative defense within the meaning of [Federal] Rule 8(c)"[3] and must be affirmatively pled. *See Resolution Tr. Corp. v. Sw. Dev. Co.*, 807 F. Supp. 375, 378 (E.D.N.C. 1992), *amended*, 837 F. Supp. 122 (E.D.N.C. 1992), *aff'd in part, rev'd in part sub nom. Resolution Tr. Corp. v. Cunningham*, 14 F.3d 596 (4th Cir. 1993).

Our state courts have treated the failure to serve notice under N.C. Gen. Stat. § 45-21.16 as an affirmative defense in various contexts. *See, e.g.*, *Barclays Am./Mortg. Corp. v. Beca Enters.*, 116 N.C. App. 100, 101, 104, 446 S.E.2d 883, 885, 887 (1994) (affirming summary judgment in favor of defendant in a foreclosure action wherein defendant "filed answer asserting . . . the affirmative defense of plaintiff's failure to serve him with Notice of Hearing in the foreclosure proceeding as required by N.C. [Gen. Stat.] § 45-21.16 (1991)," and plaintiff "was unable to surmount the affirmative defense"); *Branch Banking & Tr. Co. v. Keesee*, 237 N.C. App. 99, 766 S.E.2d 699 (Table), 2014 WL 5334744 at *6 (2014) (unpublished) (affirming the trial court's order striking defendant's affirmative defense of inadequate notice under § 45-21.16 where the clerk concluded in the orders allowing the foreclosure sales that "[p]roper notice of hearing was given to all of those parties entitled to such notice under [N.C. Gen. Stat.] § 45-21.16" and authorized the substitute trustee to "exercise the power of sale," and defendants neither raised these issues at the foreclosure proceedings nor appealed the clerk's orders).

Furthermore, our Court has considered a statutory bar to recovery as an affirmative defense. *See Roberts v. Heffner*, 51 N.C. App. 646, 648, 277 S.E.2d 446, 448 (1981) (statutory bar to recovery for failure to obtain general contractor's license required under N.C. Gen. Stat. § 87-1 is an affirmative defense). In *Roberts*, our Court defined an affirmative defense as "[a] defense which introduces new matter in an attempt to avoid [a claim], regardless of the truth or falsity of the allegations in the [claim.]" *Id.* at 649, 277 S.E.2d at 448.

Measured against this standard, it is apparent that Defendants have employed N.C. Gen. Stat. § 45-21.16 as an affirmative defense by injecting an entirely new issue into the case for the purpose of defeating Plaintiff's claim for declaratory judgment. Accordingly, Defendants' use

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3. Like N.C. Gen. Stat. § 1A-1, Rule 8(c), Rule 8(c) of the Federal Rules of Civil Procedure requires a party to plead affirmatively "any avoidance or affirmative defense." Fed. R. Civ. P. 8(c).

of N.C. Gen. Stat. § 45-21.16 falls within the purview of North Carolina Rule of Civil Procedure 8(c) and must be affirmatively pled.

Plaintiff alleged in its amended complaint:

> 13. The Hooper Deed of Trust was properly foreclosed via a Polk County special proceeding with File No. 90-SP-9. A Final Report was filed on June 19, 1990, and a Trustee's Deed from James Gary Roe, Substitute Trustee, to RF Acquisition Co., Inc., a Pennsylvania corporation, was recorded on June 19, 1990 in Deed Book 206, Page 1356. (These actions are collectively referred to as "the Hooper Foreclosure").

In their amended answer, Defendants responded:

> 13. Answering the allegations contained in Paragraph 13 of the Complaint, it is admitted that the Hooper deed of trust was foreclosed via a Special Proceeding in Polk County, North Carolina under docket number 90-SP-9 and that there was a Report of Sale filed on June 19, 1990, and a Trustee's deed from James Gary Roe, Substitute Trustee to RF Acquisition Company, a Pennsylvania corporation, recorded on June 19, 1990 in Book 206 page 1365; but except as admitted the allegations contained in Paragraph 13 of the Complaint are denied.

Defendants' admission in their answer that "the Hooper deed of trust was foreclosed via a Special Proceeding" coupled with the denial of all allegations "except as admitted" in that paragraph was not "a short and plain statement . . . sufficiently particular to give the court and the parties notice" that Defendants intended to prove that they were not given notice of the underlying foreclosure proceeding. *See* N.C. Gen. Stat. § 1A-1, Rule 8(c). Defendants thus failed to affirmatively plead the defense of lack of notice under § 45-21.16.

"Although the failure to plead an affirmative defense ordinarily results in its waiver, the parties may still try the issue by express or implied consent." *Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 673, 384 S.E.2d 36, 42 (1989); *see also* N.C. Gen. Stat. § 1A-1, Rule 15(b) (2019) ("When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.").

In this case, Defendants raised the defense of lack of notice for the first time in their memorandum of law opposing Plaintiff's motion for

judgment on the pleadings, filed 10 September 2019—approximately 15 months after their answer and 6 months after their amended answer. In its reply brief, Plaintiff stated,

> In their memorandum, Defendants assert for the first time that in the Hooper Foreclosure the statutory notice requirements of [sic] were not met. In their Answer, Defendants did not plead any defect in the manner in which the Hooper Deed of Trust was foreclosed. Because the claim was not raised in the pleadings, such a claim should not be considered as part of a Motion for Judgment on the Pleadings.

The trial court heard Plaintiff's motion for judgment on the pleadings on 8 November 2019. As Plaintiff specifically objected to the issue of notice being considered as part of the motion for judgment on the pleadings, the issue of notice was not heard by the trial court by the express or implied consent of the parties. As such, the issue of notice shall not be treated in all respects as if it had been raised in the pleadings, *see* N.C. Gen. Stat. § 1A-1, Rule 15(b), and Defendants waived this defense by failing to plead it in their answer, *see Robinson*, 348 N.C. at 566, 500 S.E.2d at 717 ("Failure to raise an affirmative defense in the pleadings generally results in a waiver thereof.").

2. Effect of foreclosure on ratifying property owners

[4] Defendants next argue that the trial court erred by holding as a matter of law that the 1986 Restrictions were extinguished as to the 40 property owners who ratified them.[4] Defendants urge that the 1986 Restrictions imposed servitudes upon the Property that are enforceable by the ratifying owners and subsequent purchasers of their properties because the Restrictions run with the land.

"The purpose of foreclosure is to allow the mortgagee to realize on the security as it existed at the time the mortgage was executed. Consequently, . . . junior easements on the servient estate are terminated by out-of-court foreclosure under a power of sale found in a senior mortgage or deed of trust . . . ." Jon W. Bruce & James W. Ely, Jr., *The Law of Easements & Licenses in Land* § 10:41 (2020). As our Supreme Court explained,

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4. The trial court held that the 1986 Restrictions "were extinguished as to the property . . . consisting of approximately 231.20 acres, more or less, formerly being known generally as the Red Fox Country Club Golf Course . . . by the foreclosure of . . . the 'Hooper Deed of Trust.' "

> If subsequent judgment creditors or litigants over the equity of redemption could "tie up" a first mortgage and effect its terms, it would seriously impair a legal contract. It may be "hard measure" to sell, but this is universally so. The mortgagee has a right to have her contract enforced under the plain terms of the mortgage. To hold otherwise would practically nullify the present system of mortgages and deeds in trust on land, so generally used to secure indebtedness and seriously hamper business.

Leak v. Armfield, 187 N.C. 625, 628, 122 S.E. 393, 394 (1924).

As explained above, the 1986 Restrictions were extinguished by the foreclosure of the Hooper deed of trust. Thus, as a matter of law, the 1986 Restrictions no longer have force and effect on the Property. *See St. Louis Union Tr.*, 211 N.C. at 344, 190 S.E. at 530 ("Title acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights."). Because the Property is no longer burdened by the 1986 Restrictions, the 40 ratifying property owners are not entitled to any rights in the Property arising from the 1986 Restrictions. *See Dixieland Realty*, 272 N.C. at 175, 158 S.E.2d at 10 (encumbrances that trustor imposed on property after execution and recording of deed of trust are extinguished by sale under foreclosure of senior instrument); *Dunn*, 148 N.C. at 282, 61 S.E. at 681 (sale under deed of trust extinguishes all encumbrances executed after deed of trust).

3. Equitable exception to extinguishment by foreclosure

[5] Defendants also argue that this Court should follow our Supreme Court's opinion in *Dixieland Realty*, and make an equitable exception in this case to the general rule that all encumbrances imposed by the trustor on the property after the execution and recording of the senior deed of trust are extinguished by sale under foreclosure of the senior instrument. In *Dixieland Realty*, the Supreme Court affirmed the settled rule of extinguishment by foreclosure. 272 N.C. at 175, 158 S.E.2d at 10. However, the Court formulated a narrow exception to the rule by holding that the foreclosure of the senior deed of trust did not extinguish the lien of the junior deed of trust, because the trustor who intended to convey the land described therein—the land the grantee expected to acquire as security for his debt—purchased the property at the senior mortgage sale following foreclosure. *Id.* at 180, 158 S.E.2d at 13-14. *See also* Restatement (Third) of Property (Mortgages) § 7.1 (1997) (It is "[o]nly in the rare instance where the mortgagor is the foreclosure purchaser do fairness and policy considerations dictate a

departure from" the principle that foreclosure extinguishes junior liens and encumbrances). The instant case does not involve a trustor who purchased his own secured property at a senior mortgage sale following foreclosure. The "rare instance" utilized in *Dixieland Realty* is distinguishable and not applicable to the facts of this case. *See id.*

4. Estoppel

[6] Defendants argue that Plaintiff should be equitably estopped from asserting that the 1986 Restrictions were extinguished by the Hooper foreclosure.[5]

North Carolina courts have long recognized the doctrine of equitable estoppel, which applies

> "when any one, by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts exist, and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts."
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> In such a situation, the party whose words or conduct induced another's detrimental reliance may be estopped to deny the truth of his earlier representations in the interests of fairness to the other party. In applying the doctrine, a court must consider the conduct of both parties to determine whether each has "conformed to strict standards of equity with regard to the matter at issue."

Whitacre P'ship v. Biosignia, Inc., 358 N.C. 1, 17, 591 S.E.2d 870, 881 (2004) (quotation marks and citations omitted). "There need not be actual fraud, bad faith, or an intent to mislead or deceive for the doctrine of equitable estoppel to apply." *Gore v. Myrtle/Mueller*, 362 N.C. 27, 33, 653 S.E.2d 400, 405 (2007).

> This Court has also recognized that branch of equitable estoppel known as "quasi-estoppel" or "estoppel by benefit." Under a quasi-estoppel theory, a party who accepts a

5. Although Defendants refer to this estoppel argument as a counterclaim in their appellate brief, in their amended answer they pled estoppel as their sixth and seventh defenses. Generally, equitable estoppel is an affirmative defense, *see Chapel H.O.M. Assocs., LLC v. RME Mgmt., LLC*, 256 N.C. App. 625, 628, 808 S.E.2d 576, 579 (2017), and we will address it as a defense. Defendants make no argument on appeal regarding their defenses of easement by implied dedication and appurtenant easement by prior use. Thus, we deem these arguments abandoned. N.C. R. App. P. 28(a).

> transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument. The key distinction between quasi-estoppel and equitable estoppel is that the former may operate without detrimental reliance on the part of the party invoking the estoppel. In comparison to equitable estoppel, quasi-estoppel is inherently flexible and cannot be reduced to any rigid formulation.
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> . . . .
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> "[T]he essential purpose of quasi-estoppel . . . is to prevent a party from benefitting by taking two clearly inconsistent positions."

Whitacre, 358 N.C. at 18-19, 591 S.E.2d at 881-82 (citations omitted).

The 1986 Restrictions gave the owner of the Property a right of first refusal to purchase a residential lot being resold to a third party. Between 5 August 1992 and 29 November 2017, Plaintiff signed 115 Waiver of Right to Purchase instruments, at the request of the sellers of the lots. Defendants argue, "If it had been the belief of [Plaintiff] that the 1986 Restrictions were extinguished by the foreclosure of the Hooper deed of trust, the Waivers would not have been necessary."

As Defendants concede in their brief, both the 1966 Restrictions and the 1986 Restrictions gave the owner of the Property a right of first refusal to purchase residential lots being resold to third parties. The waivers Plaintiff signed stated (1) that the two declarations of restrictions granting the owner of the Property a right of first refusal had been recorded, and (2) that the parties selling the lots "requested [Plaintiff] to approve said transfer[s] for the purpose of complying with and evincing compliance with" both declarations of restrictions.

The waivers were signed at the sellers' requests and merely clarified that Plaintiff had no right to repurchase the lots. The waivers did not state that the 1986 Restrictions were still in effect and did not purport to convey any interest in the Property to Defendants. Even if one could infer from this conduct that Plaintiff understood the 1986 Restrictions to still be in effect, by executing the waivers upon request, Plaintiff made no representation as to the legal effectiveness of the 1986 Restrictions.

Accordingly, by arguing before the trial court that the 1986 Restrictions were extinguished by foreclosure, Plaintiff was not denying

the truth of any earlier representations or taking a position inconsistent with an earlier position. Thus, neither the principle of equitable estoppel nor the principle of quasi-estoppel should be applied under these facts to preclude Plaintiff from asserting that the foreclosure extinguished the 1986 Restrictions.

Defendants make no argument that the 1986 Restrictions created an express easement by restricting the use of the land to a golf course. Moreover, section 42 of the 1986 Restrictions expressly disclaims any affirmative obligation by the owner of the Property. "Absent a specific restriction within the Declaration, the law presumes the free and unrestricted use of land." *Friends of Crooked Creek, L.L.C. v. C.C. Partners, Inc.*, 254 N.C. App. 384, 391, 802 S.E.2d 908, 913 (2017) (citation omitted).

In summary, Plaintiff was entitled to judgment as a matter of law that the 1986 Restrictions were extinguished by foreclosure of the earlier recorded Hooper deed of trust. Thus, the trial court did not err by granting judgment on the pleadings in favor of Plaintiff.

C. Defendants' Counterclaims

Defendants argue generally that the trial court erred by dismissing Defendants' counterclaims with prejudice, as there are genuine issues of material fact and Plaintiff is not entitled to judgment as a matter of law. Defendants assert that the trial court erred by dismissing their counterclaim seeking a declaratory judgment that the Property can only be used as a golf course. Defendants base this argument upon their contention that Plaintiff should be "equitably estopped from denying the easements created" by Plaintiff's representations, including its use of unrecorded plats, when selling properties in Red Fox Run. Defendants' argument is properly characterized as easement by estoppel.[6]

In its motion for judgment on the pleadings, Plaintiff moved to dismiss Defendants' counterclaim for declaratory judgment for failure to state a claim upon which relief may be granted. The standard of review of an order granting a motion to dismiss for failure to state a claim is "whether the [counterclaim] states a claim for which relief can be granted under some legal theory when the [counterclaim] is liberally construed and all the allegations included therein are taken as true." *Wells Fargo Bank, N.A. v. Corneal*, 238 N.C. App. 192, 195, 767 S.E.2d

6. Defendants do not argue on appeal that the trial court erred by dismissing their counterclaims for unjust enrichment, constructive trust, and appointment of receiver. We deem these arguments abandoned. N.C. R. App. P. 28(a).

374, 377 (2014). Dismissal is proper when the counterclaim on its face reveals that no law supports the claim. *Id.* "We conduct a de novo review of the pleadings to determine their legal sufficiency." *Id.*

1. Easements, generally

"An easement is a right to make some use of land owned by another . . . ." *Builders Supplies Co. of Goldsboro, N.C., Inc. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972) (citations omitted). "An appurtenant easement is an easement created for the purpose of benefiting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land." *Shear v. Stevens Bldg. Co.*, 107 N.C. App. 154, 161, 418 S.E.2d 841, 846 (1992) (citation omitted). "In easements, as in deeds generally, the intention of the parties is determined by a fair interpretation of the grant." *Borders v. Yarbrough*, 237 N.C. 540, 542, 75 S.E.2d 541, 543 (1953) (citation omitted).

2. Easement by estoppel

[7] Defendants argue that they are entitled to easements created when Plaintiff sold properties based on (1) representations made in printed marketing materials displayed in the sales office—including unrecorded plats depicting a golf course and brochures describing a golf course community; and (2) oral representations made to prospective buyers in the sales office, in which Plaintiff indicated that the lots for sale were in a golf course community. Also, Defendants argue that the mere existence of an operational golf course and golf amenities at the time prospective buyers purchased their lots affirmed these representations. Defendants contend that they detrimentally relied on these representations and that Plaintiff should be "equitably estopped from denying the existence of the easements thus created" "by the sale of the property off the plats." We disagree.

The argument that courts should apply equitable estoppel principles to create an easement based on representations in a developer's marketing materials was rejected by this Court in *Crooked Creek*. *See* 254 N.C. App. at 394, 802 S.E.2d at 915. This Court explained:

> While Crooked Creek subdivision may have been contemplated and marketed as a golf course community to induce Plaintiffs to purchase lots in the subdivision, no case has recognized an implied easement or restrictive covenants being imposed on undeveloped land, based upon statements in marketing materials. Courts have recognized marketing materials as further demonstrating

> the expressed intent of the developer, but only where a recorded instrument exists to demonstrate the intent to encumber and restrict the land.

Id. (citations omitted).

In this case, taking as true Defendants' allegations that Plaintiff represented to prospective purchasers that the Property would always be used as a golf course, Defendants fail to state a claim upon which relief may be granted, because there is no cognizable legal claim in North Carolina that an easement by estoppel restricting land has been created based on marketing materials, unrecorded plats, or plats not referenced by deed. *See id.* The trial court did not err by dismissing Defendants' counterclaim seeking declaratory judgment on this basis.

3. Easement-by-plat

[8] Construing Defendants' brief generously, Defendants argue that they are entitled to an easement-by-plat. We disagree.

An easement may be created by plat, based on the following settled principle:

> when the owner of land, located within or without a city or town, has it subdivided and platted into lots, streets, alleys, and parks, and sells and conveys the lots or any of them with reference to the plat, nothing else appearing, he thereby dedicates the streets, alleys, and parks, and all of them, to the use of the purchasers, and those claiming under them, and of the public.

Gaither v. Albemarle Hosp., Inc., 235 N.C. 431, 443, 70 S.E.2d 680, 690 (1952).

> Th[is] general rule is based on principles of equitable estoppel, because purchasers who buy lots with reference to a plat are induced to rely on the implied representation that the "streets and alleys, courts and parks" shown thereon will be kept open for their benefit. Consequently, the grantor of the lots is "equitably estopped, as well in reference to the public as to his grantees, from denying the existence of the easement thus created."

Harry v. Crescent Res., Inc., 136 N.C. App. 71, 77, 523 S.E.2d 118, 122 (1999) (quoting *Gaither*, 235 N.C. at 444, 70 S.E.2d at 690). "For an easement implied-by-plat to be recognized, the plat must show the developer

clearly intended to restrict the use of the land at the time of recording for the benefit of all lot owners." *Crooked Creek*, 254 N.C. App. at 392, 802 S.E.2d at 914 (citing *Crescent Res.*, 136 N.C. App. at 77, 523 S.E.2d at 122 ("depiction of remnant parcels on the plat was insufficient to show a clear intent by the developer to grant an easement setting them aside as open space")).

"[A] map or plat, referred to in a deed, becomes a part of the deed, as if it were written therein. A recorded plat becomes part of the description and is subject to the same kind of construction as to errors." *Stines v. Willyng, Inc.*, 81 N.C. App. 98, 101, 344 S.E.2d 546, 548 (1986) (quotation marks, ellipsis, and citations omitted). "[A] description which omits one or more of the boundaries, and leaves the quantity of land undetermined, is insufficient." *Id.* (brackets and citations omitted) (plat insufficient to create easement when "[n]othing on the plat or referred to therein would enable a title attorney to determine the precise boundaries of the area burdened with the park easement").

In *Crooked Creek*, this Court considered whether recorded subdivision plats created an easement implied-by-plat in a golf course. Plats recorded in 1992, 1993, and 1994 showed residential lots, but none depicted a golf course. 254 N.C. App. at 385, 392, 802 S.E.2d at 910, 914. A survey plat, completed to reflect undeveloped portions of the property to be sold to a third party, was recorded in 1995. *Id.* at 386, 802 S.E.2d at 910. "[T]he survey plat reflect[ed] five un-subdivided tracts of land labeled as 'A, B, C, D and F,' some previously subdivided lots, and the dotted line location of the golf course greens and fairways. Metes and bounds descriptions [we]re shown *only* for the five un-subdivided tracts." *Id.* at 392, 802 S.E.2d at 914. Plaintiffs' deeds did not reference the survey plat. *Id.* at 393, 802 S.E.2d at 914. The plats did not create an easement implied-by-plat for two reasons. First, none of plaintiffs' deeds referenced a plat recorded by the developer that depicted a golf course. *Id.* Second, even if plaintiffs' deeds had referenced the survey plat, the survey plat depicting a dotted outline of a golf course did not bind the land for golf use for the benefit of plaintiffs or create any easement or common use right to the property. *Id.* Accordingly, the recorded plats did not impose an easement-by-plat, requiring the golf course property to be perpetually used only for golf. *Id.*

In this case, Defendants alleged, in relevant part: (a) the original developer recorded subdivision plats for Red Fox Run Sections A, B, C, D, and E, which showed lots by number and identified contiguous holes on the golf course; (b) property was conveyed to third parties by deeds

to each of the lots in Sections A, B, C, D, and E, which referenced the relevant recorded plat; and (c) common areas and open spaces described in the 1986 Restrictions are not identified on the plats.

The recorded subdivision plats for Red Fox Run Sections A, B, C, D, and E depict portions of the development. The residential lot lines are depicted with solid lines and have metes and bounds descriptions. While golf course holes are depicted adjacent to some of the residential lots, as was shown in *Crooked Creek*, the plats do not include metes and bounds descriptions of the outer boundaries of the golf course or the Property. Indeed, similar to the plats in *Crooked Creek*, the outer boundaries of the Property, and thus, the golf course, are either not marked at all or are depicted with dotted lines. The description, as illustrated by the plats, is insufficient to create a golf course easement, as it "omits one or more of the boundaries, and leaves the quantity of land undetermined." *Stines*, 81 N.C. App. at 101, 344 S.E.2d at 548. Because "[n]othing on the plat or referred to therein would enable a title attorney to determine the precise boundaries of the area burdened with the [golf course] easement," the plat is not capable of describing or reducing an easement in the golf course to a certainty. *Id.* Accordingly, the trial court did not err by concluding that the subdivision plats did not create easements restricting use of the Property to a golf course.

IV. Conclusion

The trial court did not err by ruling on the motion for judgment on the pleadings in favor of Plaintiff, because (1) the trial court was not required to treat the motion as one for summary judgment; and (2) Plaintiff was entitled to judgment as a matter of law that the 1986 Restrictions were extinguished by foreclosure of the Hooper deed of trust. The trial court did not err by dismissing with prejudice Defendants' counterclaim seeking declaratory judgment that Defendants have an enforceable right to require the Property to be used as a golf course. The order of the trial court is affirmed.

AFFIRMED.

Chief Judge McGEE and Judge TYSON concur.

IN RE B.W.

[274 N.C. App. 280 (2020)]

IN THE MATTER OF B.W., T.W., L.W.

No. COA19-1000

Filed 17 November 2020

1. Child Abuse, Dependency, and Neglect—adjudication of abuse—lack of notice—allegations in petition limited to neglect

Where an abuse and neglect petition filed by a department of social services contained factual allegations of abuse regarding only one of three siblings, but neglect as to all three, the trial court's adjudication of one of the children as abused was vacated because the petition only alleged neglect with regard to that child.

2. Child Abuse, Dependency, and Neglect—abuse and neglect—allegations of sexual assault—hearsay evidence—inadmissible—no other competent evidence

The trial court's adjudication order determining three children to be abused and neglected, based on allegations that their mother's friend sexually assaulted one of them, was reversed where the court improperly admitted hearsay evidence in the form of the children's recorded statements. The trial court's conclusion that the children were unavailable to testify, made as a prerequisite to allowing the recordings under the residual hearsay exception in Evidence Rule 804(b)(5), was unsupported where it was based on findings from a pre-trial hearing at which the trial court made an oral ruling that was never reduced to a written order. With regard to the residual hearsay exception in Evidence Rule 803(24), which does not require a finding of unavailability, the court's findings that the recorded statements were more probative than any other evidence were also based on the pre-trial ruling which was never reduced to writing. The erroneously admitted statements were prejudicial, since no other competent evidence supported the court's conclusions regarding abuse and neglect.

Appeal by respondent from order entered 13 June 2019 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 3 November 2020.

Richard Penley for petitioner-appellee Onslow County Department of Social Services.

David A. Perez for respondent-appellant mother.

Guardian Ad Litem Division, N.C. Administrative Office of the Courts, by Michelle FormyDuval Lynch, for guardian ad litem.

TYSON, Judge.

Respondent-mother appeals an order adjudicating her children, "Brian," and "Lydia," as abused and neglected juveniles and her child, "Timothy," as a neglected juvenile. The parties have stipulated to pseudonyms for the minor children pursuant to N.C.R. App. P. 42(b). We vacate in part, reverse in part, and remand.

I. Background

The Onslow County Department of Social Services ("DSS") received a report on 30 April 2018 that Respondent-mother and her family were living in a shed with multiple cats, with cat feces and roaches present inside the shed. Respondent-mother agreed to a safety plan and to clean her home.

DSS received a report of sexual abuse of Brian on 25 May 2018. During the course of the investigation, Brian told social workers his mother's friend, Justin, had inappropriately touched his groin area, had anally raped him, and engaged in fellatio with him. Brian used the term "crotch" to describe his penis and bottom to describe his "anus." Brian told social workers he had informed his mother of the actions and stated she did not believe him.

Social workers interviewed Respondent-mother regarding Brian's allegations. Respondent-mother indicated Brian had accessed pornography on his electronic devices, and the details he described could be based upon materials he had observed on his phone. Respondent-mother acknowledged Justin had stayed over nights in the shed with the family and that on occasion he spent the night in the bed with the boys and herself. She denied Brian had ever told her of Justin's actions.

Timothy and Lydia were also interviewed by social workers. Both reported the poor sanitation of the shed and acknowledged Justin spent time in the home and occasionally spent the night in the shed with the family.

Clinical social worker, Sara Ellis, interviewed both Brian and Lydia on 30 May 2018 at the Children's Advocacy Center ("CAC") in Jacksonville. At the time of the interview, Brian was eleven and a half years old and Lydia was seven and a half years old. Ellis videotaped the interview while other social workers watched and listened via

live stream in another room. Brian repeated that Justin had raped him and sexually assaulted him and used the same terminology during his 25 May 2018 interview with DSS. Lydia asserted Justin had inappropriately touched her on two occasions, one of which occurred while they were sleeping on the bed with Respondent-mother.

DSS filed its petition alleging Brian was abused and that all three children were neglected on 31 May 2018. The children were removed from Respondent-mother's care on that same date. Petitions were served on the putative fathers of the children. The putative fathers did not participate in the adjudication and disposition hearing. Their cases are not before us.

Orders were entered continuing the juveniles in nonsecure custody with DSS for approximately five months. During this time, Respondent-mother entered into a case plan with DSS. Respondent-mother made progress and completed parenting classes, a psychological evaluation and began outpatient therapy. Respondent-mother and the children engaged in bi-weekly appropriate visitation. Respondent-mother obtained a suitable and clean three-bedroom home with the assistance of her parents.

Following removal from their home, the children were placed into foster care. Brian was placed in a therapeutic foster home and Timothy and Lydia were placed together in a foster home. All three children received mental health services from a licensed professional counselor, Elbert Owens.

DSS filed a "Notification and Motion to Introduce Hearsay" on 7 September 2018. DSS sought to introduce hearsay statements of Brian and Lydia at the adjudication hearing pursuant to N.C. Gen. Stat. § 8C-1, Rules 803(24) and 804(b)(5). Copies of the DVDs and statements produced from the children's interviews at the CAC had been provided to Respondent-mother's counsel on 14 June 2018 and 27 July 2018.

DSS' motion was heard at a pre-adjudication trial hearing, combined with the hearing on the need for continued nonsecure custody. The trial court orally ruled the children would be unavailable to testify at the adjudication hearing, but failed to reduce the order to writing.

On 12 December 2018, Respondent-mother's counsel subpoenaed the children to testify at adjudication. The trial court orally granted DSS' and the guardian *ad litem's* ("GAL") motion to quash these subpoenas prior to the adjudication hearing.

The adjudication hearing was held on 14 and 15 January 2019. Sara Ellis, who had interviewed Brian and Lydia, testified regarding the protocols used to conduct interviews at the CAC, as well as her training. Respondent-mother objected on hearsay grounds to Ellis' hearsay testimony and the admission of the video of Brian's statement. After *voir dire* by counsel as well as questions from the bench, the trial court allowed the CAC video interview of Brian to be admitted into evidence. After similar objections and *voir dire* of Ellis, the CAC video interview of Lydia was also admitted into evidence.

The almost two-and-a-half-hour video of Brian's CAC interview was played for the courtroom. Brian described the rapes as occurring on the bed in the shed and on a bunkbed in a travel trailer near the shed where the family accesses running water. Brian gave details of being forced onto his chest, being tied up and Justin putting his "crotch" in Brian's "bottom" and it "really hurt."

Brian described Justin putting his mouth on his "crotch." Brian defined "crotch" as where he urinated. Brian provided details of what he was wearing, of what he saw, felt, and tasted. Brian stutters and when he described Justin's attacks his stuttering increased. The video interview of Lydia was also played in the courtroom. Lydia told Ellis that Justin had touched her private area on several occasions.

DSS called Justin, the alleged perpetrator of the sexual abuse of Brian and Lydia, as a witness. Justin denied molesting or sexually assaulting any of Respondent-mother's children. Justin acknowledged occasionally staying overnight in Respondent-mother's shed and spending time with her children. He admitted sleeping in a bed with Respondent-mother and one of the children. He indicated Respondent-mother would sleep in between himself and the child. Justin was interviewed by DSS and an Onslow County sheriff's detective. No criminal indictments were issued against him for any of the allegations.

DSS called Respondent-mother as a witness. She denied that Brian had told her about being sexually assaulted by Justin. She hesitated on whether she believed Brian's and Lydia's allegations. Respondent-mother testified that her brain condition impacts her memory. The children's former social worker, Noemi Rivera, testified to the conditions of the shed and Brian's reaction when she was at his home. Over Respondent-mother's hearsay objection, the trial court allowed Rivera to testify to statements Brian made in front of her on 25 May 2018 about Justin as an excited utterance.

The children's grandmother, Respondent-mother's mother, testified on her daughter's behalf. She showed photographs of Respondent-mother's new home and its clean condition. She testified she had never observed any inappropriate contact between Justin and her grandchildren. She stated there was a "strong possibility" that Brian could have been assaulted. She also testified Lydia swam in her swimming pool with Justin in 2016.

The court adjudicated Brian and Lydia as abused and all three children to be neglected juveniles and continued the case for a hearing on disposition. The disposition hearing was held 12 February 2019. The court ordered placement authority to remain with DSS and that the children could be placed with their great-aunt in Texas. The court's written order was filed 13 June 2019 and Respondent-mother timely appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(5) (2019).

III. Issues

Respondent-mother argues the trial court erroneously adjudicated Lydia to be an abused juvenile. She also asserts the trial court erred in admitting hearsay statements of Brian and Lydia.

IV. No Allegation of Abuse

[1] DSS failed to allege any factual allegations of abuse regarding Lydia. Notwithstanding the lack of allegations, the trial court found Lydia to be an abused juvenile. "A trial court's subject matter jurisdiction over all stages of a juvenile case is established when the action is initiated with the filing of a properly verified petition." *In re T.R.P.*, 360 N.C. 588, 593, 636 S.E.2d 787, 792 (2006). A respondent must be put on notice as to the allegations against her. *In re Hardesty*, 150 N.C. App. 380, 384, 563 S.E.2d 79, 82 (2002).

The petition here only put Respondent-mother on notice as to allegations of neglect regarding Lydia. DSS and the GAL concede that the trial court erred by concluding Lydia was an abused juvenile. The portion of the trial court's order finding Lydia is an abused juvenile is vacated.

V. Residual Hearsay Exceptions

[2] Respondent-mother asserts the trial court's finding the children were unavailable to appear and testify under Rule 804(b)(5) incorporates purported findings of fact from an unwritten determination from

the 8 November 2018 hearing. Respondent-mother further contends no competent record evidence supports the necessity to admit the juveniles' hearsay statements under Rule 803(24). She argues competent evidence does not exist to support the trial court's adjudication of her children as neglected or abused. DSS filed a motion to supplement the record on appeal and for this Court to order the court stenographer to transcribe the pre-trial hearing. That motion was denied.

A. Standard of Review

"The admission of evidence pursuant to the residual exception to hearsay is reviewed for an abuse of discretion, and may be disturbed on appeal only where an abuse of such discretion is clearly shown. The appellant must show that [he or she] was prejudiced and a different result would have likely ensued had the error not occurred." *In re W.H.*, 261 N.C. App. 24, 27, 819 S.E.2d 617, 620 (2018) (alteration in original) (internal quotation marks and citation omitted).

B. Analysis

DSS sought introduction of the hearsay statements and video under both residual hearsay exceptions, Rules 803(24) (declarant's availability immaterial) and 804(b)(5) (declarant unavailable). Hearsay may be admissible under these residual exceptions where the statement is:

> not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it gives written notice stating his intention to offer the statement and the particulars of it, including the name and address of the declarant, to the adverse party sufficiently in advance of offering the statement to provide the adverse party with a fair opportunity to prepare to meet the statement.

N.C. Gen. Stat. § 8C-1, Rules 803(24), 804(b)(5) (2019). The statute requires the trial court to make findings of fact of (A), (B) and (C) stated above and for the proponent to provide the mandated prior notice to the adverse party. *Id.*

Our Supreme Court has interpreted both residual exceptions to require the trial court to conduct a six-part inquiry and determine whether: (1) proper notice has been given; (2) the hearsay statement is not specifically covered elsewhere; (3) the statement possesses circumstantial guarantees of trustworthiness; (4) the statement is material; (5) the statement is more probative than any other evidence which the proponent can procure through reasonable efforts; and, (6) the interest of justice will be best served by admission. *State v. Smith*, 315 N.C. 76, 92-96, 337 S.E.2d 833, 844-46 (1985) (holding the trial court must engage in this six-part inquiry in determining whether to admit proffered hearsay evidence under Rule 803(24)); *State v. Triplett*, 316 N.C. 1, 8, 340 S.E.2d 736, 741 (1986) (holding the trial court must proceed with the same six-part inquiry prescribed by *State v. Smith* in determining whether hearsay testimony may be admitted under Rule 804(b)(5)).

Respondent-mother's assertions on appeal challenge the purported incorporated findings based upon Owens' testimony and the children's unavailability. She contends any finding in the Adjudication Order supported by Owens' testimony on 18 November 2018 is erroneous and unsupported by competent evidence.

1. *Rule 804(b)(5)*

It is undisputed the trial court must make findings of fact and conclusions of law on the record when determining the admissibility of a hearsay statement. *State v. Valentine*, 357 N.C. 512, 518, 591 S.E.2d 846, 853 (2003) (citations omitted).

Our Supreme Court has held:

> admitting evidence under the catchall hearsay exception . . . is error when the trial court fails to make adequate findings of fact and conclusions of law sufficient to allow a reviewing court to determine whether the trial court abused its discretion in making its ruling. If the trial court either fails to make findings or makes erroneous findings, we review the record in its entirety to determine whether that record supports the trial court's conclusion concerning the admissibility of a statement under a residual hearsay exception.

State v. Sargeant, 365 N.C. 58, 65, 707 S.E.2d 192, 196 (2011) (citation omitted).

In relevant part, the trial court found:

> n. . . . At a hearing on the need for continued nonsecure custody and adjudication pre-trial conducted on November

> 8th, 2018, the Judge heard evidence in the form of testimony of the juvenile's therapist, Elbert Owens. That hearing pertained to Rule 804 (b) (5), whether the juveniles would be declared unavailable for testimony, as [Respondent-mother's counsel] indicated that he would subpoena on behalf of the respondent mother the juveniles for testimony at the adjudication of this matter. On that date the Court made specific findings of fact as to why the juveniles were unavailable to testify at the adjudication of this matter. The Court adopts each findings of fact as noted in that Order from the November 8th, 2018 court date and incorporates them into this finding, for purposes of this adjudication order pursuant to Rule 804(b)(5) as follows.

The only written recording of the 8 November 2018 hearing is the form nonsecure custody order, which fails to include any required findings about determining the juveniles to be "unavailable." DSS and the GAL argue that findings regarding unavailability from the 8 November 2018 hearing are not invalid and were memorialized later in the court's Adjudication Order.

"The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment." *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 214, 580 S.E.2d 732, 737 (2003), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004). "[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2019).

Here, while the parties may have been aware of the court's announcement of its decision that the children would be unavailable, precedent requires that the trial court enter sufficient findings of fact to support its conclusion of unavailability. *State v. Fowler*, 353 N.C. 599, 610, 548 S.E.2d 684, 693 (2001); *State v. Clonts*, 254 N.C. App. 95, 115, 802 S.E.2d 531, 545, *aff'd*, 371 N.C. 191, 813 S.E.2d 796 (2018).

"The degree of detail required in the finding of unavailability will depend on the circumstances of the particular case." *Triplett*, 316 N.C. at 8, 340 S.E.2d at 740. In *Triplett*, the declarant was deceased. Our Supreme Court held the trial court's determination of unavailability was properly "supported by a finding that the declarant [was] dead, which finding in turn [was] supported by evidence of death." *Id.*

The court's order indicates it relied upon the testimony of Owens to find the juveniles were unavailable. The order references Owens'

testimony in its determination that it "would be detrimental to the health and safety of the juveniles if the juveniles were compelled to testify regarding allegations of acts of sexual abuse perpetrated on them, by Justin [], and allowed to be perpetrated on them by the respondent mother." At the adjudication hearing, counsel for DSS simply states that at the 8 November 2018 hearing, Owens testified and the court ruled "the children would be unavailable to testify."

Owens' specific testimony is not set forth in the Adjudication Order. DSS argues the record on appeal submitted by Respondent-mother includes a file stamped letter from Owens. Owens' letter states "providing . . . testimony would likely re-traumatize the children." However, this letter is not a substitute for sworn testimony nor does it contain the findings required by our Supreme Court. It is impossible for this Court to determine whether the trial court's findings in its adjudication are supported by clear and convincing evidence.

The trial court's finding of fact that testifying would be detrimental to the health and safety of the juveniles is not supported by competent evidence and cannot support its conclusion that the juveniles were unavailable to testify in person at the adjudication hearing as to the sexual abuse they suffered. *Triplett*, 316 N.C. at 8, 340 S.E.2d at 740. In the absence of any physical evidence of abuse and a denial of any of the alleged acts by Justin, and Respondent-mother, the prejudice to Respondent-mother is readily apparent. Respondent-mother is unable to present a defense to test the credibility of these statements and to ferret out or challenge the statements, any improper conduct, coaching, or other basis for these allegations.

2. *Rule 803(24)*

DSS' motion to introduce the hearsay statements asserted the statements were admissible under both Rules 803(24) and 804(b)(5). The only distinction between the rules is the finding of unavailability required for Rule 804(b)(5). *Triplett*, 316 N.C. at 8, 340 S.E.2d at 741.

Before allowing the residual hearsay at the adjudication, the trial court must "determine whether (1) proper notice has been given; (2) the hearsay statement is not specifically covered elsewhere; (3) the statement possesses circumstantial guarantees of trustworthiness; (4) the statement is material; (5) the statement is more probative than any other evidence which the proponent can procure through reasonable efforts; and (6) the interest of justice will be best served by admission." *In re W.H.*, 261 N.C. App. at 27, 819 S.E.2d at 620 (citing *Smith*, 315 N.C. at 92-96, 337 S.E.2d at 844-46).

In the present case, the trial court made purported findings regarding the hearsay within the CAC video interview of Brian. The trial court made nearly identical findings with respect to Lydia's statements in the CAC video.

Respondent-mother challenges the trial court's decision the statement is more probative than any other evidence which the proponent can procure through reasonable efforts.

> The availability of a witness to testify at trial is a crucial consideration under either residual hearsay exception. Although the availability of a witness is deemed immaterial for purposes of Rule 803(24), that factor enters into the analysis of admissibility under subsection (B) of that Rule which requires that the proffered statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." If the witness is available to testify at trial, the "necessity" of admitting his or her statements through the testimony of a "hearsay" witness very often is greatly diminished if not obviated altogether.

State v. Fearing, 315 N.C. 167, 171–72, 337 S.E.2d 551, 554 (1985) (citation omitted).

In the district court transcript, the parties referenced *In re M.A.E.*, 242 N.C. App. 312, __ S.E.2d __ (2015). In that case, the respondents challenged the trial court's conclusion that a female child sexual assault victim's statements were "more probative on the point for which they are offered than any other evidence which [DSS] can procure through reasonable efforts[.]" *Id.* at 318, __ S.E.2d at __. The respondents argued "the trial court failed to properly consider [the child's] availability to testify in person at the adjudicatory hearing." *Id.*

In *M.A.E.*, the trial court found it would be detrimental to the welfare of the juvenile to be compelled to come to court. *Id.* at 319, __ S.E.2d at __. The court found the child would "suffer from anxiety," "the courtroom setting itself would likely be overwhelming . . . even in a closed-circuit situation," and causing the child to testify "could hamper" her progress in therapy. *Id.*, __ S.E.2d at __. There the trial court found "the proffered hearsay statements . . . were more probative on the point for which they [were] offered than any other evidence the proponent [could] procure through reasonable efforts due to the age, risk and bias of [the child]." *Id.*

Our Court reviewed the record and transcript and held the trial court's findings were consistent with the testimony of the child's therapist. *Id.* This Court recognized the therapist had testified that she was concerned the child would not be truthful "because she 'may feel guilt and maybe feel like she is getting someone in trouble and that she doesn't want anyone to be in trouble.' " *Id.*

Here, in relevant part, trial court found:

> iv. The statements of the juveniles to include the video taped recordings is more probative on the issue of sexual abuse than any other evidence which DSS could procure through reasonable efforts.
>
> This Court previously had a hearing on the availability of the testimony of the juveniles to provide testimony. This Court found as fact that it would be detrimental to the health and safety of the juveniles if the juveniles were compelled to testify regarding allegations of acts of sexual abuse ·perpetrated on them by Justin [] and allowed to be perpetrated on them by the respondent mother. This was based upon the testimony of the juveniles' therapist, Elbert Owens, as provided on November 8th , 2019 (sic).

Here, the trial court found it would be detrimental to the juveniles' health and safety for them to testify based upon unwritten findings of fact from a nonexistent order. This same unsupported finding cannot support any finding that the hearsay statements of the juveniles in their recorded interviews at the CAC were more probative than any other evidence DSS could have obtained. This Court cannot evaluate whether the court's findings are consistent with the testimony of the children's therapist.

The best evidence DSS could procure of the children's allegations of abuse are from the children themselves. Respondent-mother had subpoenaed her children for adjudication, but these subpoenas were quashed by the trial court prior to trial. The trial court erred by adopting purported findings from the 8 November 2018 hearing. The recorded statements were inadmissible as an exception to the hearsay rule solely under Rule 803(24).

Where the court's findings and conclusions are not supported by other evidence, the admission of incompetent evidence is prejudicial. *See In re McMillon*, 143 N.C. App. 402, 411, 546 S.E.2d 169, 175 (holding the admission of incompetent evidence is not prejudicial where there is

other competent evidence to support the district court's findings), *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001). Respondent-mother was prevented from preparing and asserting a defense and has demonstrated prejudice exists. Without the inadmissible hearsay, no clear and convincing evidence supports the court's findings of abuse and neglect. The allegations against Respondent-mother based upon her allowed sexual assaults of Brian have no other evidentiary support.

VI. Conclusion

The trial court improperly concluded Lydia was an abused juvenile where no such allegation was asserted by DSS. That portion of the court's order is vacated.

The trial court's finding of fact that testifying would be detrimental to the health and safety of the juveniles is unsupported and is insufficient to support its conclusion that the juveniles were unavailable to testify in person at the adjudication hearing based upon the sexual abuse they allegedly suffered.

The CAC video was improperly admitted under both residual hearsay exceptions. Without the CAC video, no other evidence supports the trial court's determination that Brian was abused or that Brian, Timothy, or Lydia were neglected. The trial court's order is reversed and remanded. *It is so ordered.*

VACATED IN PART, REVERSED IN PART, AND REMANDED.

Judges MURPHY and HAMPSON concur.

IN RE L.G.

[274 N.C. App. 292 (2020)]

IN THE MATTER OF L.G.

No. COA19-1129

Filed 17 November 2020

1. Child Abuse, Dependency, and Neglect—motion to continue—absence of parent—no abuse of discretion

The trial court did not abuse its discretion by denying the motion to continue made by respondent-mother's counsel at the permanency planning hearing for the daughter. Counsel gave no reason, other than the mother's absence, showing why a continuance would help identify the appropriate permanent plan for the daughter; further, counsel advocated for the mother's interests effectively despite her absence, and she could not demonstrate prejudice.

2. Child Abuse, Dependency, and Neglect—permanency planning—not placed with parent—required findings

The trial court erred by establishing a guardianship for respondent-mother's daughter with her grandparents without making any findings regarding whether it was possible for the daughter to be placed with a parent within the next six months, as required by N.C.G.S. § 7B-906.1(e)(1). Where the trial court's other findings could support such a determination, the matter was remanded for consideration of the issue and, if appropriate, inclusion of the appropriate additional findings.

3. Child Abuse, Dependency, and Neglect—permanency planning—waiver of further hearings—termination of jurisdiction

The trial court erred by waiving further permanency planning hearings pursuant to N.C.G.S. § 7B-906.1(n) where respondent-mother's child had not been residing in her current placement for at least one year. The trial court further erred by failing to retain jurisdiction over the matter where the order acknowledged the parties' right to file a motion in the cause for review and established reunification as the secondary plan.

Appeal by Respondent-Mother from orders entered 9 September 2019 by Judge Andrea F. Dray in Buncombe County District Court. Heard in the Court of Appeals 3 November 2020.

John C. Adams for petitioner-appellee Buncombe County Department of Health and Human Services.

Jackson M. Pitts for guardian ad litem-appellee.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for respondent-appellant mother.

MURPHY, Judge.

Respondent-Mother, Sam,[1] challenges the trial court's denial of her motion to continue when she was not present and unable to testify on her own behalf at a permanency planning and review hearing. Sam appeals from the trial court's orders awarding guardianship pursuant to a primary permanency plan to the paternal grandparents of the minor child, Wanda, and dissolving the trial court's jurisdiction of this matter.

In a permanency planning and review hearing regarding an abused and neglected child's placement, a trial court does not abuse its discretion when it denies to continue the hearing when the mother is not present and there was no request by the mother's counsel for time to allow counsel to contact the mother. Where a trial court orders a juvenile's placement to be with a person other than a parent, the trial court meets the statutory requirements when it makes written findings regarding whether it is possible for the juvenile to be placed with a parent within the next six months, and if not, why placement is not in the juvenile's best interest. A trial court abuses its discretion when these findings are not included in a permanency planning hearing order. Finally, when a trial court dissolves jurisdiction in a matter, it must make a finding the juvenile has resided in the placement for a period of at least one year.

BACKGROUND

Wanda was born in March 2015 and is the only child of Sam and Respondent-Father, Peter, who are married. During the course of these proceedings, Sam and Peter have both struggled with substance abuse.

On 19 August 2017, Peter placed Wanda in his car at approximately 1:30 a.m., intending to drive to the store. He instead re-entered their residence and passed out due to his ingestion of Xanax, a benzodiazepine for which he did not have a prescription. Two-year-old Wanda remained alone in the car and strapped in her car seat until she was found the next morning at 7:00 a.m. On 12 October 2017, Buncombe County Department of Health and Human Services ("DHHS") filed a juvenile petition alleging

1. We use pseudonyms for all relevant persons throughout this opinion to protect the juvenile's identity and for ease of reading.

Wanda was abused and neglected. In addition to describing Sam and Peter's substance abuse and its effects on Wanda, the petition alleged Sam was facing eviction and lacked safe and stable housing.

At a hearing on 13 December 2017, Sam and Peter stipulated to the petition's material allegations and to the stipulated allegations supporting the conclusion Wanda was an abused and neglected juvenile. The trial court entered an order on 9 February 2018 adjudicating Wanda to be abused and neglected and maintaining her in a temporary safety placement.[2] The trial court ordered Sam and Peter to participate in parenting education courses and to "continue to engage in substance abuse treatment to obtain an abstinence based recovery," submitting to random drug screens, completing detox and inpatient treatment, and complying with all recommendations of their treatment providers. Sam was granted weekly supervised visitation with Wanda.

The trial court held an initial permanency planning hearing on 28 February 2018 and established a primary permanent plan for Wanda of preventing an out-of-home placement with a secondary permanent plan of reunification. The trial court maintained these permanent plans through four subsequent permanency hearings ending on 6 February 2019, keeping Wanda in a temporary safety placement as Sam and Peter worked toward attaining sobriety. Between 3 and 16 August 2018, Wanda was transitioned out of her maternal grandmother's home into a temporary safety placement with her paternal grandmother.

Beginning in September 2018, Sam was granted unsupervised visits with Wanda, eventually progressing to sixteen hours per week of unsupervised visitation. Following a sixth permanency planning review hearing on 1 May 2019, the trial court changed the primary permanent plan to reunification and established a secondary plan of guardianship. The trial court authorized Sam and Peter to have unsupervised overnight visitations with Wanda in their home at the discretion of the Child and Family Team. All unsupervised visits were then suspended by DHHS in June 2019, following Sam's use of alcohol while caring for Wanda.

The trial court held the next permanency planning hearing on 30 July 2019 and entered the resulting *Subsequent Permanency Planning and Review Order* ("permanency planning order") on 9 September 2019.

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2. Although the decretal portion of the trial court's order purports to place Wanda in DHHS custody, the remainder of the order and the court's subsequent orders reveal this to be a scrivener's error. Prior to placing Wanda in guardianship with her paternal grandparents in September 2019, the trial court left Wanda in Sam and Peter's custody subject to a "temporary safety placement."

Based on the parties' evidence and the recommendations of DHHS and the guardian ad litem ("GAL"), the trial court changed Wanda's primary permanent plan to guardianship and her secondary plan to reunification. The trial court appointed the paternal grandmother and her husband as Wanda's guardians. The trial court also awarded Sam and Peter two hours of weekly supervised visitation but authorized the guardians to deny visitation if either Sam or Peter appeared to be intoxicated. Simultaneous to its entry of the permanency planning order on 9 September 2019, the trial court entered a *Guardianship Order* confirming Wanda's placement in the legal guardianship of her paternal grandparents. Sam filed timely notice of appeal from the *Subsequent Permanency Planning and Review Order* and *Guardianship Order* on 19 and 20 September 2019.

ANALYSIS

A. Denial of Continuance

[1] Sam first argues the trial court abused its discretion by denying her oral motion to continue the 30 July 2019 permanency planning hearing based on her absence from the proceeding. We disagree.

"Ordinarily, a motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review."[3] *In re A.L.S.*, 374 N.C. 515, 516-17, 843 S.E.2d 89, 91 (2020) (quoting *State v. Walls*, 342 N.C. 1, 24, 463 S.E.2d 738, 748 (1995)). To prevail on appeal, Sam must demonstrate "the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re C.J.C.*, 374 N.C. 42, 47, 839 S.E.2d 742, 746 (2020) (quoting *In re A.R.A.*, 373 N.C. 190, 199, 835 S.E.2d 417, 423 (2019)). She must also show she "suffered prejudice as a result of the error." *In re A.L.S.*, 374 N.C. at 517, 843 S.E.2d at 91 (quoting *Walls*, 342 N.C. at 24-25, 463 S.E.2d at 748). "Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice." *In re Humphrey*, 156 N.C. App. 533, 538, 577 S.E.2d 421, 425 (2003) (citation omitted).

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3. Sam's counsel did not assert a continuance was necessary to protect a constitutional right. *See In re A.L.S.*, 374 N.C. at 517, 843 S.E.2d at 91 (noting if "the motion is based on a right guaranteed by the Federal and State Constitutions, the motion presents a question of law and the order of the court is reviewable"); *In re C.M.P.*, 254 N.C. App. 647, 653, 803 S.E.2d 853, 857 (2017) ("[R]espondent's motion to continue was not based on a constitutional right, and we review the trial court's denial of the motion for abuse of discretion.").

The transcript of the 30 July 2019 permanency planning hearing shows Sam's counsel made an oral motion to continue due to Sam's absence. Noting Sam had consistently attended all court proceedings, Sam's counsel advised the trial court as follows:

> Recently, [Sam] has had some issues, and she emailed me yesterday letting me know that she had checked into Pardee [Hospital]. She intends to go from there into a rehab facility. But given the [DHHS and GAL] reports that are in front of the [c]ourt and the requests and recommendations, I am asking the [c]ourt to continue this matter. [4]
>
> My client has received copies of the report[s], but given how we received them, she just got them . . . and has not been able to communicate back to me any – anything about her comments on them or regarding the recommendations. But given that the [c]ourt is being asked today to close, I would ask that the matter be held op[en] or continued over so my client can participate today since I won't be able to represent what she would desire, based on the reports.

DHHS, Peter, the GAL, and the paternal grandmother objected to a continuance. DHHS reported it had not received confirmation of Sam's enrollment in inpatient substance abuse treatment. Reminding the trial court Wanda had been "out of home for [twenty-one[5]] months," the GAL confirmed "we would be asking for guardianship to be granted to these paternal grandparents" even if Sam was present for the hearing. The paternal grandmother argued Sam "had the opportunity to admit herself into a treatment program" when her relapse first came to light in mid-June 2019 and yet waited until the eve of the hearing to do so.

In denying Sam's motion, the trial court observed the case had been "before the Court now for [twenty-three] months," and pointed to the amount of information contained in the court file and in the reports submitted by DHHS and the GAL. The trial court proceeded to hear testimony from the family's START social worker and Wanda's paternal grandparents. Sam's counsel actively participated in the hearing, cross-examining the social worker and the paternal grandmother.

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4. In their reports filed on 24 July 2019 and admitted into evidence without objection, DHHS and the GAL recommended changing Wanda's primary permanent plan to guardianship and appointing her paternal grandmother as guardian.

5. The Record shows Wanda entered a temporary emergency placement with maternal grandmother in September 2017, more than twenty-three months before the 30 July 2019 hearing.

Sam has failed to carry her burden to show the trial court abused its discretion when it denied her motion to continue. The purpose of a permanency planning hearing is to identify the "best permanent plans to achieve a safe, permanent home for the juvenile" consistent with the juvenile's best interest. N.C.G.S. § 7B-906.1(g), (i) (2019); *see also* N.C.G.S. § 7B-906.2(a) (2019). Sam's counsel made no proffer, other than Sam's absence, tending to suggest a continuance would further the cause of identifying the appropriate permanent plan for Wanda. *See In re A.L.S.*, 374 N.C. at 518, 843 S.E.2d at 92 (noting "counsel offered only a vague description of the [absent witness's] expected testimony and did not tender an affidavit or other offer of proof to demonstrate its significance"). Although Sam's counsel stated she had not received her client's "comments" about the reports filed by DHHS and the GAL, there was no suggestion Sam intended to dispute any of the information contained in the reports or the court file.

Moreover, the mere fact Sam was not present for the hearing is not *per se* prejudicial. *See In re C.M.P.*, 254 N.C. App. 647, 653, 803 S.E.2d 853, 857 (2017); *see also In re Murphy*, 105 N.C. App. 651, 658, 414 S.E.2d 396, 400 ("When . . . a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail upon appeal."), *aff'd per curiam*, 332 N.C. 663, 422 S.E.2d 577 (1992). Sam's counsel advocated for Sam's interests in an effective manner. *See Murphy*, 105 N.C. App. at 658, 414 S.E.2d at 400 (holding the respondent "failed to produce any evidence of prejudice" resulting from his absence from hearing to terminate his parental rights).

Sam argues her "testimony was necessary to clarify her physical and mental and emotional state, which was in turn necessary" for the trial court to determine whether Wanda could be permanently returned to Sam's care "within a reasonable period of time" under N.C.G.S. § 7B-906.1(d)(3), or whether it was possible to place Wanda with Sam within the next six months as contemplated by N.C.G.S. § 7B-906.1(e)(1). However, when making the oral motion, Sam's counsel did not indicate Sam intended to testify; nor did counsel offer a forecast of Sam's potential testimony. *See Murphy*, 105 N.C. App. at 655, 414 S.E.2d at 399 ("During the hearing, respondent's attorney did not argue that his client would be able to testify concerning any defense to termination, nor did he indicate how his client would be prejudiced by not being present."). Sam's counsel's representation that Sam had just entered an inpatient substance abuse treatment facility appeared to foreclose the prospect

of Wanda's reunification with her mother in the near future.[6] "[Sam] thus fails to demonstrate any prejudice arising from the trial court's denial of her motion to continue." *In re A.L.S.*, 374 N.C. at 518, 843 S.E.2d at 92.

Sam also cites our holding in *In re D.W.*, 202 N.C. App. 624, 693 S.E.2d 357 (2010) to support her argument. In *In re D.W.*, we held the trial court abused its discretion by denying the respondent's motion to continue a termination of parental rights hearing based on the respondent's absence. *Id.* at 629, 693 S.E.2d at 360. *In re D.W.* noted a confluence of factors justifying the continuance, none of which were present here:

> First, [r]espondent notes that it was unclear whether she received notice of the hearing. . . . Furthermore, the [R]ecord indicates that the trial court was on notice that [r]espondent suffered from diminished capacity, possibly making her absence involuntary. . . . Also, it was apparent from the transcript that external time constraints negatively affected the nature of the proceeding in such a manner as might have been avoided through the issuance of a continuance. Lastly, we are troubled by the trial court's failure to ascertain the nature of the proceeding prior to issuing a ruling on a motion to continue . . . .

Id. at 628, 693 S.E.2d at 360. *In re D.W.* is inapposite and the trial court did not abuse its discretion in denying Sam's motion to continue. *Id.*

B. Lack of Findings under N.C.G.S. § 7B-906.1(e)(1)

[2] Sam argues the trial court erred by establishing a guardianship for Wanda without "consider[ing] and mak[ing] written findings regarding '[w]hether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests[,]' " as required by N.C.G.S. § 7B-906.1(e)(1). We agree.

Where the trial court does not place the juvenile with a parent following a permanency planning hearing, N.C.G.S. § 7B-906.1(e)(1) requires the trial court to enter findings of fact regarding, *inter alia*, "[w]hether it is possible for the juvenile to be placed with a parent within the next six months and, if not, why such placement is not in the juvenile's best interests." N.C.G.S. § 7B-906.1(e)(1) (2019). "The trial court's findings must explain 'why [Wanda] could not be returned home immediately or within

6. Sam's counsel later acknowledged Sam was "struggling" and averred she had entered inpatient substance abuse treatment "as of yesterday" with "a plan going forward to go to ADATC from there, and then her intention is to go to Abba House."

the next six months, and why it is not in [her] best interests to return home.' " *In re J.H.*, 244 N.C. App. 255, 273, 780 S.E.2d 228, 241 (2015) (quoting *In re I.K.*, 227 N.C. App. 264, 275, 742 S.E.2d 588, 595-96 (2013)).

As a general matter, "[o]ur review of a permanency planning order entered pursuant to N.C.[G.S.] § 7B-906.1 is 'limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law.' " *In re J.S.*, 250 N.C. App. 370, 372, 792 S.E.2d 861, 863 (2016) (quoting *In re J.H.*, 244 N.C. App. at 268, 780 S.E.2d at 238). The trial court's findings of fact "are conclusive on appeal when supported by any competent evidence, even if the evidence could sustain contrary findings." *In re L.T.R.*, 181 N.C. App. 376, 381, 639 S.E.2d 122, 125 (2007) (internal quotation marks omitted). We have characterized a trial court determination of a juvenile's best interest as a conclusion of law which must be supported by its findings of fact. *In re Helms*, 127 N.C. App. 505, 510-11, 491 S.E.2d 672, 676 (1997); *see also In re Chasse*, 116 N.C. App. 52, 62, 446 S.E.2d 855, 861 (1994) ("When making a disposition or reviewing one, a trial court must enter an order with findings sufficient to show that it considered the best interest of the child.").

The permanency planning order here makes no mention of the possibility of Wanda's placement with either parent within the next six months. However, the trial court's contemporaneously-entered *Guardianship Order* includes the following finding:

> 12. [Wanda] has been placed with her paternal grandparents, since August of 2018, and it is in [Wanda's] best interest that she be placed in the legal guardianship of them, as they are committed to caring for [Wanda] and being her legal guardian[s], and as it is unlikely [Sam and Peter] will be able to care for [Wanda] within the next six months.

The permanency planning order includes the following findings of fact supporting the trial court's assessment:

> 27. On [13 June 2019], the Department became aware that [Sam] had relapsed on alcohol and had been drinking in the home the night before, while [Wanda] was there and being cared for by [Peter]. It was reported that [Sam and Peter], with [Wanda], arrived at the home of paternal grandmother to put the child to bed, on [12 June 2019], and that [Sam] was under the influence of alcohol. A decision was made to return to only supervised time between [Wanda] and both [Sam and Peter], until further notice.

28. On [20 June 2019], an emergency meeting was called to talk about the new concerns and make a plan moving forward. . . . The team agreed that [Sam] would need to take action regarding her relapse and recent use, in order to move back towards unsupervised time with [Wanda]. [Sam] acknowledged her use of alcohol, and apologized for her behavior and choices. It was decided that [DHHS] would hold a similar meeting with [Peter] at a later time.

29. On [28 June 2019], the social worker stopped by the apartment of [Sam and Peter] as the social worker had not had further contact with [Peter]. He reported that on this date, [Sam] would no longer be allowed to live in the apartment. He reported that she may have a place to live temporarily in Henderson County. [Peter] reported that he believes that his marriage is over, and that he has had concerns for some time that [Sam] has been drinking alcohol. . . .

. . .

31. [Sam] completed an updated Comprehensive Clinical Assessment to identify any new or additional treatment needs at Women's Recovery Center. It was recommended that she continue her MAT services and also attend weekly individual therapy. [Sam] started her individual therapy sessions on [8 July 2019] . . . .

. . .

33. On or about [12 July 2019], [Sam] moved into Biltmore Housing, in a Half Way/Sober Living home. She moved out about [14 July 2019], due to not feeling like the home was a good fit.

. . .

35. On [19 July 2019], the social worker learned from paternal grandmother that [Sam] did not make her visitation with [Wanda] on [18 July 2019]. It was reported that on [18 July 2019], [Sam] contacted the paternal grandmother and [Sam] may have been intoxicated, was in a bad emotional state, and was alone in her car. The social worker followed up with [Sam] the next day who reported that she quit her new job, and was waiting to coordinate an admission into detox and inpatient rehab through the Behavioral Health Urgent Care or Crossroads.

36. [Sam and Peter] were required to complete 8 random drug screens with [DHHS]. [Peter] missed three screens, had 1 negative for illicits but was with abnormal creatine and non-prescribed Gabapentin, had 1 negative but was with abnormal creatine, had two that were negative for illicits but were with non-prescribed Gabapenti[n], and had 1 (oral) which was positive for Fentanyl, Norfentanyl, Cocaine, and Cocaine Metabolite.

. . .

38. [Sam] missed 1 screen, had three that were negative/normal, had 2 (1 oral and 1 urine) [that] were positive for Fentanyl, and had two that were positive for alcohol and/or cocaine.

39. Several screens were positive for prescribed Gabapentin. [Sam] does admit alcohol use. She has reported no use of Fentanyl, and no knowledge of coming into contact with this substance that could lead to a positive test.

. . .

41. [Wanda's] GAL concludes that [Wanda] is a bright young girl living in a safe and secure environment with her paternal grandparents.

. . .

45. [Sam] has had numerous positive screens and missed screens since June of 2019. [Peter] has had numerous positive screens and failed screens since June of 2019. [Sam] has visited regularly, up until about two weeks ago. [The social worker] has not spoken to [Sam] since last week, and has received no confirmation that [Sam] is in treatment. [Peter] continues to be involved with Crossroads and with a START program, but he continues to test positive. . . .

46. [Peter] is in favor of the submitted recommendations.

. . .

48. The paternal grandparents reside in a two bedroom apartment in Buncombe County, in which [Wanda] has her own bedroom. They have no impairments and/or health concerns that would impede their care for [Wanda]. Their monthly income is approximately 20,000 dollar[s] . . ., and

> as such, their income exceeds their liabilities. [Wanda] will have been in their home for one year, as of [3 August 2019]. . . . [Sam] has missed 3 consecutive visits and has called the paternal grandmother, severely intoxicated. [Sam] has presented for visits, impaired, with [Wanda]. . . . .
>
> . . .
>
> 51. Pursuant to N.C.G.S. § 7B-903(a)(2)(c), the paternal grandparents . . . are aware of the legal responsibilities of accepting legal guardianship of [Wanda] and they are willing and able to provide proper care and supervision of [Wanda] in a safe environment.
>
> 52. Pursuant to N.C.G.S. § 7B-906(b), [Wanda] is placed with the paternal grandparents, . . . and this placement is stable, and the continuation of the placement is in [her] best interest.
>
> 53. It is in the best interest of [Wanda] that [s]he be placed in the legal guardianship of the paternal grandparents . . . at this time.

Sam does not challenge any of these findings of fact so they are presumed to be supported by competent evidence and binding on appeal. *See Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991).

We hold while the trial court included findings of fact in the permanency planning order that could support a potential conclusion it was not possible for Wanda to be placed with Sam or Peter within six months, it failed to make that conclusion of law in the permanency planning order. We remand this matter for the trial court's consideration of this issue and if the trial court so concludes, to include specific language regarding the possibility of Wanda being placed with a parent within six months in the permanency planning order.[7]

C. Waiver of Further Hearings

[3] Lastly, Sam argues the trial court erred by waiving further permanency planning hearings pursuant to N.C.G.S. § 7B-906.1(n) and by "dissolv[ing]" its jurisdiction and releasing DHHS, the GAL, and counsel from further responsibility in the case effective 3 August 2019. DHHS and the GAL concede these errors and recognize the need to remand this cause to the trial court for correction thereof.

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7. In its brief, the GAL maintains this matter "should be remanded to correct the trial court's error in failing to include specific language that it is not possible for [Wanda] to

N.C.G.S. § 7B-906.1(n) authorizes the trial court to waive periodic permanency planning hearings if the trial court finds by clear and convincing evidence each of the following:

> (1) The juvenile has resided in the placement for a period of at least one year or the juvenile has resided in the placement for at least six consecutive months and the court enters a consent order pursuant to [N.C.]G.S. 7B-801(b1).
>
> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C.G.S. § 7B–906.1(n)(1-5) (2019).

Here, the trial court found Wanda would have resided in her current placement for one year as of 3 August 2019, four days after the 30 July 2019 hearing date. The trial court purported to waive further hearings and terminate its jurisdiction as of the anniversary date, decreeing as follows:

> 12. That [Wanda] will have been in the home of the paternal grandparents for one year, beginning on [3 August 2019]; and, that on that date, jurisdiction of this Court over such person shall dissolve.
>
> 13. That this cause shall need not be brought back on for review in [the] normal course unless requested by any party hereto.

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be placed with a parent within six months. However, the GAL-Appellee contends that the findings of fact already contained in the subject permanency planning order are sufficient to support a conclusion that it is not possible for [Wanda] to be placed with [Sam] within six months." While we agree with the GAL it could support such a conclusion, on remand the trial court is free to enter a conclusion of law it finds appropriate and we do not dictate such a conclusion is mandated by the findings of fact.

> 14. That, on [3 August 2019], this cause shall be removed by the [c]lerk of [c]ourt from the juvenile docket, and [DHHS], and all court-appointed representatives shall be released from further responsibility in this cause.

We agree with the parties that the trial court erred in this regard. The trial court had no authority to waive further hearings in this matter because Wanda had not been residing in her current placement for at least one year at the time of the permanency planning hearing. *See In re J.H.*, 244 N.C. App. at 278, 780 S.E.2d at 244; *In re P.A.*, 241 N.C. App. 53, 66, 772 S.E.2d 240, 249 (2015). Furthermore, the trial court's purported decision to terminate or "dissolve" its own jurisdiction effective 3 August 2019 is inconsistent with its findings elsewhere in the order acknowledging the parties' right to file a motion in the cause for review. The permanency planning order contains the following findings of fact, conclusions of law, and decrees:

> 61. Pursuant to N.C.G.S. § 7B-905.1(d), any party may file a motion for review to address the current visitation plan.
>
> . . .
>
> 15. That, pursuant to N.C.G.S. § 7B-905.1(d), any party may file a motion for review to address the current visitation plan.
>
> . . .
>
> 17. That pursuant to § 7B-201, [Wanda] will have been in the home of the paternal grandparents for one year, beginning on [3 August 2019]; therefore, jurisdiction of this [c]ourt over such person will dissolve on that date. This cause need not be brought back on for review in [the] normal course unless requested by any party hereto, and upon the attainment of such date, this cause may be removed by the [c]lerk of [c]ourt from the juvenile docket, and [DHHS], and all court-appointed representatives should be released from further responsibility in this cause.
>
> . . .
>
> 12. That [Wanda] will have been in the home of the paternal grandparents for one year, beginning on [3 August 2019]; and, that on that date, jurisdiction of this [c]ourt over such person shall dissolve.

> 13. That this cause shall need not be brought back on for review in [the] normal course unless requested by any party hereto.

See generally N.C.G.S. § 7B-201(b) (2019) ("When the [juvenile] court's jurisdiction terminates, whether automatically or by court order, the court thereafter shall not modify or enforce any order previously entered in the case . . . ."). The trial court's decision is also at odds with its finding and conclusion that "[t]he conditions that caused [DHHS] to become involved in this matter have not yet been addressed, and ceasing [S]tate involvement would be contrary to the health and safety of [Wanda] at this time[,]" as well as its oral statement at the conclusion of the hearing that "[t]his [c]ourt does retain jurisdiction."[8]

Finally, because the trial court's order established reunification as the secondary permanent plan, "[Sam] continued to have the right to have [DHHS] provide reasonable efforts toward reunifying [Wanda] with her, and the right to have the court evaluate those efforts." *In re C.S.L.B.*, 254 N.C. App. 395, 398, 829 S.E.2d 492, 494 (2017). Accordingly, we remand this matter to the trial court to correct the failure to satisfy the requirement set forth in N.C.G.S. § 7B-906.1(n)(1) and the failure of the trial court to retain jurisdiction and for DHHS to continue reunification efforts in this matter.

CONCLUSION

We affirm the trial court's denial of Sam's motion to continue. We remand to the trial court to address its error in failing to conclude and, if appropriate, include specific language in the *Subsequent Permanency Planning and Review Order* that it is not possible for Wanda to be placed with a parent within six months. Further, we remand to the trial court to correct the failure to satisfy the requirement set forth in N.C.G.S. § 7B-906.1(n)(1) and the failure to retain jurisdiction of this matter, and for DHHS to continue further efforts of reunification.

REMANDED.

Judges TYSON and HAMPSON concur.

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8. We note the trial court did not convert the proceeding into a child custody action under N.C.G.S. Chapter 50 pursuant to N.C.G.S. § 7B-911.

NYAMEDZE QUAICOE, BY AND THROUGH HIS GUARDIAN AD LITEM, SALLY A. LAWING, FAFANYO ASISEH AND OBED QUAICOE, PLAINTIFFS

v.

THE MOSES H. CONE MEMORIAL HOSPITAL OPERATING CORPORATION D/B/A MOSES CONE HEALTH SYSTEM, D/B/A WOMEN'S HOSPITAL; JODY BOVARD STUCKERT M.D., PIEDMONT HEALTHCARE FOR WOMEN, P.A., D/B/A GREENSBORO OB/GYN ASSOCIATES, DEFENDANTS

No. COA20-233

Filed 17 November 2020

Public Officers and Employees—State Health Plan—liens—subject matter jurisdiction—courts

The trial court properly dismissed plaintiffs' motion to reduce the North Carolina State Health Plan's (SHP's) lien on proceeds from a medical malpractice settlement for lack of subject matter jurisdiction (pursuant to Civil Procedure Rule 12(b)(1)) because the SHP is a creature of statute, and neither the state constitution nor the General Statutes confer jurisdiction upon the courts to reduce SHP liens.

Appeal by Plaintiffs from an Order entered 27 September 2019 by Judge David L. Hall in Guilford County Superior Court. Heard in the Court of Appeals 8 September 2020.

The Law Offices of Wade Byrd, P.A., by Wade E. Byrd, and Nichols Zauzig Sandler, PC, by Charles J. Zauzig, III, and Melissa G. Ray, pro hac vice, attorneys for plaintiffs-appellants.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tamara Mary Van Pala, for State Health Plan.

HAMPSON, Judge.

Factual and Procedural Background

Nyamedze Quaicoe (Minor Plaintiff), by and through his Guardian *ad Litem*, Sally A. Lawing, and his parents, Fafanyo Asiseh and Obed Quaicoe, (collectively, Plaintiffs) appeal from an Order entered 27 September 2019 denying Plaintiffs' Motion[1] requesting the

1. Plaintiffs' Motion is captioned "Motion to Reduce Medicaid Lien"; however, Plaintiffs' Motion requested the trial court reduce both the Medicaid lien and the SHP lien.

trial court reduce a North Carolina State Health Plan (SHP) lien on monetary proceeds from a minor settlement. The Record before us shows the following:

In April 2017, Plaintiffs filed a Complaint alleging medical malpractice against the Moses H. Cone Memorial Hospital Operating Corporation d/b/a Moses Cone Health System d/b/a Women's Hospital, Jody Bovard Stuckert M.D., Piedmont Healthcare for Women, P.A. d/b/a Greensboro OB/GYN Associates (collectively, Defendants) for serious and permanent injuries Minor Plaintiff sustained during birth. At the time of the incident giving rise to Plaintiffs' medical malpractice claim, Plaintiffs had health insurance coverage through the SHP along with Medicaid. The medical malpractice action was later settled by consent of both parties, approved by the trial court, and placed under seal on 20 May 2019. A trust was created for the disbursement of settlement proceeds for the Minor Plaintiff.

During the course of settlement negotiations, on 25 March 2019, Plaintiffs filed their Motion seeking to have the trial court reduce the monetary amount of liens imposed on the settlement by both SHP and Medicaid. Plaintiffs subsequently secured a voluntary reduction in the Medicaid lien. SHP, however, objected to any reduction of its lien against the settlement proceeds and moved to dismiss Plaintiffs' Motion for lack of subject-matter jurisdiction and for failing to state a claim for which relief can be granted under Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure. SHP also filed a Notice of Limited Appearance with the trial court, explaining its status as a nonparty but asserting it would appear to argue its Motion to Dismiss.[2]

On 27 September 2019, the trial court entered a written Order denying Plaintiffs' Motion to Reduce State Health Plan Lien (Order). In denying Plaintiffs' Motion, the trial court emphasized "there is no case law or statutory authority for an equitable reduction or waiver of the Plan's lien under N.C. [Gen. Stat.] §135-48.37." Accordingly, the trial court concluded: "This court lacks jurisdiction to reduce or modify the Plan's lien and denies Plaintiffs' Motion. Plaintiffs have failed to state a claim upon which relief may be granted." Plaintiffs filed Notice of Appeal on 22 October 2019.

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2. The State Health Plan initially moved to intervene in Plaintiffs' case; however, its Motion to Intervene was subsequently withdrawn.

Issue

The sole issue before this Court on appeal is whether the trial court erred in denying Plaintiffs' Motion for lack of subject-matter jurisdiction.

Analysis

I. Subject-Matter Jurisdiction

"Subject matter jurisdiction refers to the power of the court to deal with the kind of action in question[ ]" and "is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "A court's lack of subject matter jurisdiction is not waivable and can be raised at any time, including on appeal." *Banks v. Hunter*, 251 N.C. App. 528, 531, 796 S.E.2d 361, 365 (2017) (citations omitted). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

The North Carolina State Health Plan is codified at N.C. Gen. Stat. §§ 135-48.1 *et seq.*, and was created by the General Assembly "exclusively for the benefit of eligible employees, eligible retired employees, and certain of their eligible dependents, which will pay benefits in accordance with the terms of this Article." N.C. Gen. Stat. § 135-48.2(a) (2019). The General Assembly delegated administration and operation of the SHP to the State Treasurer, *id.* § 135-48.30, and broadly directed "[t]he Plan shall administer one or more group health plans that are comprehensive in coverage." *Id.* § 135-48.2(a).

Section 135-48.37, titled "Liability of third person; right of subrogation; right of first recovery," provides:

> The Plan shall have the right of subrogation upon all of the Plan member's right to recover from a liable third party for payment made under the Plan, for all medical expenses, including provider, hospital, surgical, or prescription drug expenses, to the extent those payments are related to an injury caused by a liable third party. The Plan member shall do nothing to prejudice these rights. The Plan has the right to first recovery on any amounts so recovered, whether by the Plan or the Plan member, and whether recovered by litigation, arbitration, mediation, settlement, or otherwise. Notwithstanding any other provision of law to the contrary, the recovery limitation set forth in G.S. 28A-18-2 shall not apply to the Plan's right of subrogation of Plan members.

N.C. Gen. Stat. § 135-48.37(a). Subsection (d) limits, "[i]n no event shall the Plan's lien exceed fifty percent (50%) of the total damages recovered by the Plan member, exclusive of the Plan member's reasonable costs of collection as determined by the Plan in the Plan's sole discretion." *Id.* § 135-48.37(d). A separate section—Section 135-48.24—describes the administrative review process for claims brought under the SHP. *Id.* § 135-48.24.

In part, Plaintiffs requested the trial court "hold a hearing pursuant to N.C. [Gen. Stat.] § 108A-57 and determine the appropriate amount of the lien." In denying Plaintiffs' Motion, the trial court correctly noted Section 108A-57 addresses Medicaid liens and only provides recourse for the trial court to reconsider the amount of a Medicaid lien, *see* N.C. Gen. Stat. § 108A-57(a2) (2019), and, instead, Section 135-48.37 governs liens imposed under the SHP. N.C. Gen. Stat. § 135-48.37. SHP moved the trial court to dismiss Plaintiffs' Motion under N.C.R. Civ. Pro. 12(b)(1) for lack of subject-matter jurisdiction. N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2019). On appeal, Plaintiffs contend the trial court had jurisdiction over Plaintiffs' Motion based on the court's general role in protecting the rights of minors and its inherent judicial power.

The State Health Plan, however, is a creature of statute, created by the General Assembly and administered by the State Treasurer pursuant to Sections 135-48.1 *et seq*. In enacting Section 135-48.37, the General Assembly expressly provided "[t]he Plan has the right to first recovery on any amounts so recovered, whether by the Plan or the Plan member, and whether recovered by . . . settlement[.]" N.C. Gen. Stat. § 135-48.37(a). The SHP is not always entitled to recover a lien in full; the General Assembly limited liens imposed by the SHP under Section 135-48.37 so as not to exceed "fifty percent (50%) of the total damages recovered by the Plan member . . . ." *Id.* § 135-48.37(d); *see State Health Plan for Teachers & State Emps. v. Barnett*, 227 N.C. App. 114, 116, 744 S.E.2d 473, 474 (2013) ("[T]he State Health Plan is authorized to recover up to one-half of the total damages, less attorney's fees, recovered by a Plan member from a third party.").

"Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris*, 84 N.C. App. at 667, 353 S.E.2d at 675. Here, Plaintiffs have not pointed to any constitutional provision or general statute conferring jurisdiction on the courts of this State to reduce the monetary amount of SHP liens imposed upon a settlement pursuant to N.C. Gen. Stat. § 135-48.37. Instead, Plaintiffs cite a string of cases from our Supreme Court and argue this Court has equitable jurisdiction because of North Carolina courts' strong interest in protecting the rights of minors. However, this Court has clarified: "the

equity powers of neither the trial court nor this Court extend into areas which are expressly governed by statute." *Orange County ex rel. Byrd v. Byrd*, 129 N.C. App. 818, 822, 501 S.E.2d 109, 112 (1998); *c.f. Dare Cnty. v. N.C. Dep't of Ins.*, 207 N.C. App. 600, 611, 701 S.E.2d 368, 376 (2010) ("[T]he extent to which the trial court had subject matter jurisdiction over Petitioners' request for judicial review of the consent order depends upon whether the General Assembly has enacted any statutory provisions authorizing Petitioners to seek and obtain judicial review of the consent order.").

Here, there is no dispute SHP's lien is expressly governed by Section 135-48.37. What Plaintiffs sought from the trial court, and what it now asks of this Court, is to reduce the amount of the SHP lien based on principles of equity. However, Section 135-48.37 does not confer jurisdiction to review the amount of the SHP lien. Although we are sensitive to the facts underlying this case, we are constrained by the language of Section 135-48.37. *Orange County ex rel. Byrd*, 129 N.C. App. at 822, 501 S.E.2d at 112 ("[W]e are not free to either ignore or amend legislative enactments because when the language of a statute is clear and unambiguous, the courts must give it its plain meaning." (citing *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977))). Plaintiffs' proper recourse is with the General Assembly as "the judiciary should avoid ingrafting upon a law something that has been omitted which it believes ought to have been embraced." *Shaw v. U.S. Airways, Inc.*, 362 N.C. 457, 463, 665 S.E.2d 449, 453 (2008) (alterations, citations, and quotation marks omitted). Therefore, we conclude the trial court was correct in determining it lacked subject-matter jurisdiction over Plaintiffs' Motion.

Plaintiffs also argue the trial court misapplied North Carolina's Administrative Procedure Act and erred in concluding Plaintiffs failed to state a claim upon which relief may be granted under N.C.R. Civ. P. 12(b)(6), which determination Plaintiffs contend should be reviewed for abuse of discretion arguing it was based on a misapprehension of the law. However, because we conclude the trial court was correct in determining it did not have subject-matter jurisdiction over Plaintiffs' Motion, we do not reach Plaintiffs' subsequent arguments.

Conclusion

Accordingly, for the foregoing reasons, the trial court's Order is affirmed.

AFFIRMED.

Chief Judge McGEE and Judge DIETZ concur.

SHORT v. CIRCUS TRIX HOLDINGS, LLC

[274 N.C. App. 311 (2020)]

CHARLES J. SHORT, PLAINTIFF
v.
CIRCUS TRIX HOLDINGS, LLC; SKY ZONE LLC; SKY ZONE FRANCHISE GROUP, LLC; SKYZONE ASHEVILLE, LLC D/B/A SKYZONE TRAMPOLINE PARK; AND JOHN DOES 1-3, DEFENDANTS

No. COA20-285

Filed 17 November 2020

Agency—waiver of liability—arbitration agreement—wife signed for husband—factual dispute regarding agency relationship—remanded for additional findings

In plaintiff's action to recover damages for injuries that he sustained at a trampoline park, the trial court's order denying defendant's motion to compel arbitration was vacated and the matter remanded for additional findings resolving factual disputes on the issue of agency. Although the trial court concluded there was no valid arbitration agreement because plaintiff had not read or signed the park's liability waiver (which contained an arbitration clause), the court's order did not address whether plaintiff's wife was acting on his authority, whether actual or apparent, when she signed the liability waiver for both of them and their three children, thereby creating an agency relationship and binding plaintiff to the arbitration agreement.

Appeal by Defendants from an Order entered 13 September 2019 by Judge Marvin P. Pope in Buncombe County Superior Court. Heard in the Court of Appeals 20 October 2020.

Davis Law Group, P.A., by Brian F. Davis, for plaintiff-appellee.

Cranfill Sumner & Hartzog, LLP, by John W. Ong, Meredith F. Hamilton, and Steven A. Bader, for defendants-appellants.

HAMPSON, Judge.

Factual and Procedural Background

Circus Trix Holdings, LLC, Sky Zone, LLC, Sky Zone Franchise Group, LLC, and Sky Zone Asheville, LLC d/b/a Sky Zone Trampoline Park (collectively, Defendants) appeal from the trial court's 13 September 2019 Order denying Defendants' Motion to Compel Arbitration where the trial court ruled there was no valid agreement to arbitrate between the parties. The Record before us tends to show the following:

On 4 April 2019, Charles J. Short (Plaintiff) filed a First Amended Complaint[1] (Complaint) asserting Defendants violated North Carolina's Device Safety Act and were negligent in connection with injuries Plaintiff sustained while visiting Defendants' trampoline park in Asheville, North Carolina. Plaintiff alleged on or about 27 January 2018, Plaintiff and his wife decided to celebrate their daughter's birthday at Sky Zone Asheville trampoline park. On or about that same date, Plaintiff's wife visited Sky Zone Asheville's website to book the party. As part of the online booking process, Plaintiff's wife filled out and signed liability waivers for Plaintiff and the couple's three children. Plaintiff further alleged, at no time prior to the incident in question, did Plaintiff know about his wife's signing a waiver, nor did he authorize her to do so. The Complaint further alleged, upon arrival at Sky Zone Asheville, Plaintiff and his group were "checked in" by a manager, then the group removed and stowed their shoes.

Plaintiff asserted he then began to "look around the facility to see what other activities were offered" before making his way to the "free climb" wall. Plaintiff claimed he asked the attendant for direction on "what to do" and the attendant responded "just climb the wall and jump into the foam pit. Keep your feet apart when you jump." Plaintiff then climbed the wall and, before jumping off, asked the attendant: "And I can just jump off?" The attendant responded, "jump away from the wall, land feet first. Go ahead and jump." Plaintiff claimed he did as the attendant instructed, and when he entered the pit and his feet impacted the floor, he fractured both his right and left tibias.

On 16 July 2019, Defendants filed their Motions to Dismiss and Answer to Plaintiff's First Amended Complaint (Answer). In their Answer, Defendants alleged "Plaintiff signed a Participant Agreement, Release and Assumption of Risk with Sky Zone . . . contain[ing] an arbitration provision which is specifically highlighted by requesting that the signor place an 'X' acknowledging that he/she read the clause." Defendants also argued the trial court lacked subject-matter jurisdiction based on the signed agreement containing the arbitration clause. Defendants admitted all customers are required to read and sign a "Participation Agreement, Release and Assumption of Risk" (Agreement) online or at the facility prior to being allowed to use Sky Zone Asheville's facilities and equipment. Defendants also admitted an Agreement "was signed by or for Plaintiff[.]" Defendants further raised a number of affirmative defenses including: Release and Waiver; Arbitration, as set forth in the Agreement; and Contractual Limitations.

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1. Plaintiff filed an earlier Complaint on 25 January 2019 alleging Defendants' negligence and "wanton conduct" caused Plaintiff's injuries.

Also on 16 July 2019, Defendants filed a Motion to Compel Arbitration and Stay Proceedings (Arbitration Motion). Defendants attached an Affidavit of Sky Zone (Defendants' Affidavit)—completed by Sky Zone Asheville General Manager Travis Wilson Fowler—and a copy of the Agreement purportedly signed by Plaintiff. Defendants alleged Plaintiff "electronically signed the agreement for himself" and "entered into the Agreement in consideration of Plaintiff being allowed to use the Sky Zone Asheville facilities and equipment . . . ." The Agreement's arbitration clause states:

> I understand that by agreeing to arbitrate any dispute . . . I am waiving my right, and the right(s) of the minor child(ren) above, to maintain a lawsuit against [Defendants] . . . for any and all claims covered by this Agreement. By agreeing to arbitrate, I understand that I will NOT have the right to have my claim determined by a jury . . . .

In Defendants' Affidavit, Travis Fowler stated he became the general manager in January 2018 and was the general manager at the time Plaintiff was injured. Fowler then explained Sky Zone Asheville's policies and procedures regarding Participation Agreements and customers using Sky Zone Asheville's facilities. Fowler stated all participants must sign an Agreement before entering and using the facilities. In addition, "all participants had to check in and be provided with a temporary sticker" in order to confirm they "had signed and acknowledged the Agreement." According to Fowler, temporary stickers were not "provided to those individuals who had not executed the Agreement, either online or in person."

Fowler stated Sky Zone Asheville's "online system for the execution of the Agreement" recorded information about the participant and this information "was then used when the participant arrived in order to confirm their execution of the agreement." Fowler also asserted, on the day of Plaintiff's injury, Plaintiff would have been asked if [he] had completed the Agreement online." Those who had not completed the agreement online would have been directed to a "Waiver Station Kiosk" where they would complete the Agreement and receive a receipt. A participant would then take this receipt to the check-in counter where the participant would buy a ticket and receive a temporary sticker. Participants who advise they completed the Agreement online are directed to the check-in counter where a Sky Zone Asheville employee checks the online system to confirm completed Agreements before participants buy a ticket and receive a sticker. Moreover, Fowler stated in January 2018, there were Guest Responsibility signs placed throughout the facility

advising participants they were required to execute the Agreement and of other warnings.

On 28 August 2019, Plaintiff filed a Response to Defendants' Motion to Compel Arbitration and Stay Proceedings (Response). In this Response, Plaintiff asserted he did not sign the Agreement; Plaintiff's wife signed the Agreement for him without Plaintiff's "permission or authorization;" at no time "before, during, or after his arrival at Sky Zone Asheville did Plaintiff expressly or impliedly enter into any agreements with Sky Zone Asheville;" and there "was never a mutual agreement, or meeting of the minds, between the parties." Plaintiff submitted affidavits from himself and his wife with this Response.

In his affidavit, Plaintiff asserted he went to Sky Zone Asheville on 27 January 2018, to celebrate, as part of a group totaling approximately twenty-six people, his daughter's birthday. According to Plaintiff, as the group entered Sky Zone Asheville, "a male employee approached [the group] and inquired if we had signed up and purchased tickets online." Plaintiff's wife, and some of the other adults, replied they had signed up online and the employee took them to a counter to "complete the check-in process." Another employee approached Plaintiff, some of the remaining adults, and the fourteen children and led them to an area where the group could remove and stow their socks and shoes. Then, Plaintiff's wife approached from the check-in counter and handed Plaintiff socks for use in the facility. Plaintiff's affidavit then recounted the events alleged in the Complaint leading up to and including his injury.

The remainder of Plaintiff's affidavit states "at no time prior to the incident in this case," did any Sky Zone Asheville employee ask Plaintiff if he had signed an online agreement or waiver or direct Plaintiff to a "Waiver Station Kiosk." Plaintiff further asserted at no time prior to the incident did he notice the "Waiver Station Kiosk" or "anything inside Sky Zone Asheville . . . that alerted [Plaintiff] to the need and/or requirement for signing any agreement and/or waiver." Plaintiff asserted he did not know, nor did he "have reason to know," his wife had completed an online agreement waiving any of his legal rights, and he did not authorize his wife, expressly or impliedly, to do so. Moreover, according to Plaintiff, his wife did not seek his permission to sign any agreement or waiver.

For her part, Plaintiff's wife, Deanna Short, stated in her affidavit she "went online to Sky Zone's website and filled out the required paperwork" for Plaintiff and their children. Plaintiff's wife stated she did not ask Plaintiff's permission to do so, nor did she tell or notify Plaintiff she had signed the Agreement for Plaintiff. According to Plaintiff's wife,

when the group entered Sky Zone Asheville, an employee "approached us and inquired if we had signed up and purchased tickets on-line." Plaintiff's wife said she had, as did some of the other adults, and the employee took her to the check-in counter. Plaintiff's wife asserted the employee asked her if she had completed the paperwork online and she said she had, but did not recall "being given any tickets and/or any temporary stickers by the Sky Zone employee . . . ." Plaintiff's wife further asserted the employee did not ask if Plaintiff had signed the Agreement, nor did the employee ask her to "go get [Plaintiff] . . . so that he could confirm that he had electronically signed the agreement and/or waiver[.]" Plaintiff's wife then recounted handing Plaintiff socks for the group and being alerted to Plaintiff's injury.

The trial court heard Defendants' Motion at a 3 September 2019 hearing. Almost immediately after the hearing began, the trial court stated, "what it boils down to, correct me if I'm wrong, it boils down to whether or not Mr. Short signed the arbitration." The trial court continued: "If [Plaintiff] signed it, okay, he's subject to arbitration. If he didn't sign it, he's not subject to arbitration." The trial court then asked if Defendants had any evidence showing Plaintiff, in fact, signed the Agreement and counsel replied they did not. However, Defendants' counsel stated the affidavits showed Plaintiff's wife did sign the Agreement for Plaintiff as—Defendants claimed—his agent. Defendants' counsel asserted Plaintiff "knew, according to his affidavit, that [Plaintiff's wife] responded in the affirmative that she had signed up and purchased tickets online. He was also aware that she went to complete the check-in process while he was there." Counsel further stated Plaintiff was only allowed entry after Plaintiff's wife completed the check-in process and that there were signs posted alerting participants "must have completed and signed the agreement." Defendants' counsel continued to reiterate Plaintiff's wife completed the check-in process, with Plaintiff's knowledge, and Plaintiffs wife told Sky Zone Asheville employees she had "completed the paperwork online[.]"

Plaintiff's counsel responded saying, based on the affidavits, Plaintiff did not enter into any agreement with Defendants and that Plaintiff hearing his wife "sign[ed] up and [bought] tickets online" was not sufficient to alert Plaintiff she had signed the Agreement for him. Counsel further asserted: "at no time did [Plaintiff], either through implication or an express agreement or apparent agency situation, . . . ever say you have my permission to sign an agreement for me." Both Plaintiff's and Defendants' counsel continued to argue whether the affidavits showed there was an agreement, whether Plaintiff was aware of

the requirement to sign a waiver or agreement, and whether Plaintiff's wife acted as his agent—to include signing the Agreement.

At the close of oral arguments, the trial court denied Defendants' Motion. Defendants' counsel asked the court to include "factual findings in the denial;" the trial court agreed, and Plaintiff's counsel stated he would draft the Order and findings. The trial court told Plaintiff's counsel to "do findings of fact as to what transpired with everything."

On 13 September 2019, the trial court issued an Order denying Defendants' Motions to Dismiss and Compel Arbitration. The Order contained Findings of Fact including: Plaintiff's wife completed the online check-in process and paperwork on Sky Zones Asheville's website; Plaintiff's wife "checked" the clause in the Agreement titled "Arbitration of Disputes;" Plaintiff's wife typed Plaintiff's name into the end of the Agreement form; and Plaintiff did not know his wife completed the Agreement form by entering Plaintiff's name and information. The trial court accepted the sequence of events beginning with Plaintiff and his family arriving at Sky Zone Asheville and ending with the completion of the check-in process as stated in Plaintiff's and his wife's affidavits. The trial court also found Plaintiff did not see the signs alerting participants of the need to sign waivers as referenced in Defendants' affidavit.

Based on the affidavits and oral arguments, the trial court concluded there was "no mutual agreement and no meeting of the minds between Plaintiff . . . and Defendants[,]" necessary for a valid agreement to arbitrate under North Carolina law. The trial court further concluded: "Because Plaintiff . . . had not read the Agreement, Sky Zone's attempt to bind him to the arbitration clause is not sufficient to prove the necessary mutual agreement between the parties." Accordingly, the trial court held the Agreement's arbitration clause was "unenforceable against" Plaintiff.

On 11 October 2019, Defendants timely filed a written Notice of Appeal from the trial court's 13 September Order denying Defendants' Motion to Compel Arbitration.

Issue

The dispositive issue on appeal is whether the trial court's Findings of Fact adequately resolve the factual disputes between the parties as to the existence of a valid arbitration clause to support its denial of Defendants' Motion to Compel Arbitration.

Analysis

Defendants' appeal of the trial court's Order is interlocutory. "Generally, there is no right of immediate appeal from interlocutory

orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). However, "immediate appeal is available from an interlocutory order or judgment which affects a substantial right." *Sharpe v. Worland*, 351 N.C. 159, 162, 522 S.E.2d 577, 579 (1999) (quotation marks omitted). "[T]he right to arbitrate a claim is a substantial right which may be lost if review is delayed, and an order denying arbitration is therefore immediately appealable." *U.S. Trust Co., N.A. v. Stanford Grp. Co.*, 199 N.C. App. 287, 289-90, 681 S.E.2d 512, 514 (2009) (citation and quotation marks omitted). Accordingly, Defendants' appeal is properly before us.

"When a party disputes the existence of a valid arbitration agreement, the trial judge must determine whether an agreement to arbitrate exists." *Sciolino v. TD Waterhouse Investor Servs., Inc.*, 149 N.C. App. 642, 645, 562 S.E.2d 64, 66 (2002). When reviewing the denial of a motion to compel arbitration, findings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if there is evidence to the contrary. *Bookman v. Britthaven, Inc.*, 233 N.C. App. 454, 457, 756 S.E.2d 890, 893 (2014). "Accordingly, upon appellate review, we must determine whether there is evidence in the record supporting the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate." *Id.* (citation and quotation marks omitted). Moreover, when deciding pretrial motions, "[i]f the trial court chooses to decide the motion based on affidavits, the trial judge must determine the weight and sufficiency of the evidence presented in the affidavits much as a juror." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation, Inc.*, 169 N.C. App. 690, 694, 611 S.E.2d 179, 183 (2005).

In this case, the parties dispute the existence of a valid arbitration agreement. Plaintiff contends he never signed the Agreement himself and he did not know his wife signed the Agreement, nor did he authorize her to do so. At the hearing, Defendants argued Plaintiff's wife signed the Agreement as Plaintiff's agent and Defendant Sky Zone Asheville relied on that authority. Defendants' counsel admitted there was not evidence Plaintiff signed the Agreement himself, but there was evidence Plaintiff was aware his wife signed Plaintiff up online. Defendants' counsel also argued there was evidence Plaintiff was, or should have been, aware the sign up and check-in process included waivers as there were signs posted in the facility alerting customers of this requirement. Plaintiff's affidavit asserts he did not recall seeing such signs.

Based on these arguments and the affidavits in the Record, the trial court found: (1) Plaintiff's wife signed the Agreement for him, without

Plaintiff's knowledge; (2) Plaintiff did not sign the Agreement; and (3) Plaintiff was not aware of the need to sign the Agreement. The trial court then concluded as a matter of law: (1) because Plaintiff did not sign the Agreement, there was no "mutual agreement and no meeting of the minds" between Plaintiff and Defendants; (2) because Plaintiff had not read the Agreement, there was no mutual agreement to which Defendants could bind Plaintiff; and therefore (3) the Agreement's arbitration clause was unenforceable against Plaintiff.

However, "[t]he law of contracts governs the issue of whether an agreement to arbitrate exists." *Brown v. Centex Homes*, 171 N.C. App. 741, 744, 615 S.E.2d 86, 88 (2005). An agent may contractually bind a principal to a third party if the third party can establish an agency relationship between the principal and agent. *Bookman*, 233 N.C. App. at 457-58, 756 S.E.2d at 893-94. "An agent's authority to bind [a] principal . . . can be shown only by proof that the principal authorized the acts to be done or that, after they were done, [the principal] ratified them." *Id.* "Apparent authority is that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent [the agent] possesses[,]" and the principal's liability "must be determined by what authority the third person in the exercise of reasonable care was justified in believing" the principal conferred to the agent. *Id.* at 458, 756 S.E.2d at 894.

At the motion hearing, Defendants argued, generally, such an agency relationship existed between Plaintiff and his wife, and Defendants relied on Plaintiff's manifestations holding his wife out as his agent. For its part, the trial court made no findings of fact as to whether an agency relationship existed between Plaintiff and his wife on any of the above agency theories. The trial court's findings only addressed the uncontested fact Plaintiff did not sign the Agreement. The trial court did not address the central factual disputes as to whether an agency relationship between Plaintiff and his wife existed such that Plaintiff's wife could bind him to the Agreement. The trial court accepted the affidavits as true without weighing the parties' incompatible narratives on what those affidavits proved as to agency.

On appeal, Plaintiff argues no such agency relationship existed and we should presume the trial court found there was no agency relationship. Defendants argue Plaintiff's wife had actual and/or apparent authority to bind Plaintiff to the Agreement, or in the alternative, the trial court made no such findings which we can review. The Record—through affidavits and oral arguments—reflects a number of factual disputes regarding agency. Because the trial court did not decide the

key factual issue of agency, we cannot, in turn, decide the issue as a matter of law. *See Parker v. Town of Erwin*, 243 N.C. App. 84, 99, 776 S.E.2d 710, 722 (2015) ("the trial judge had the responsibility of acting as a fact-finder . . . and was responsible for determining the weight and sufficiency of the evidence" (citations and quotation marks omitted)). Accordingly, we vacate the trial court's Order and remand to the trial court for appropriate findings of fact to resolve the parties' factual disputes regarding agency and to support its conclusion as to whether the parties mutually agreed to arbitration. *See Bookman*, 233 N.C. App. at 461, 756 S.E.2d at 896 (reversing and remanding a trial court's denial of a motion to compel arbitration because the trial court made no findings of fact concerning apparent authority).

Conclusion

Accordingly, for the foregoing reasons, we vacate the trial court's Order and remand this matter to the trial court for additional proceedings on the question of agency.

VACATED AND REMANDED.

Judges BRYANT and DIETZ concur.

STATE OF NORTH CAROLINA
v.
NOWLIN POWELL CROOKS

No. COA20-146

Filed 17 November 2020

1. Criminal Law—jury instructions—possession of a firearm by a felon—defense of justification

In a possession of a firearm by a felon case where, in the light most favorable to defendant, the evidence showed defendant grabbed the firearm from an intoxicated man in a trailer after the man fired the gun into a wall near him, defendant then left the trailer to find someone sober to take the gun, and defendant did not dispose of the gun—but could have—once he left the trailer and continued to possess the gun in the presence of others, the trial court properly denied defendant's request for a jury instruction on the defense of justification. Any impending threat of death or serious bodily injury ended when defendant left the trailer with the gun and

he was required to relinquish possession of the firearm once the threat was gone.

2. Attorney Fees—criminal case—civil judgment—notice and opportunity to be heard

In a case involving possession of a firearm by a felon where defendant's counsel had not calculated his hours worked at the time of sentencing and the trial judge told defendant that once counsel calculated the hours the court would sign what it felt to be a reasonable fee, the court's later entry of a civil judgment for $2,220 without informing defendant of the specific amount deprived defendant of a sufficient opportunity to address the court on the entry of judgment for that amount. Therefore, the civil judgment was vacated and remanded for further proceedings.

Appeal by defendant from judgments entered 19 September 2019 and 20 September 2019 by Judge Kevin M. Bridges in Catawba County Superior Court. Heard in the Court of Appeals 8 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Donna B. Wojcik, for the State.

Stephen G. Driggers for defendant.

DIETZ, Judge.

Defendant Nowlin Crooks appeals his conviction for possession of a firearm by a felon, arguing that he was entitled to a jury instruction on the defense of justification. He also challenges the civil judgment entered against him for the attorneys' fees of his court-appointed counsel.

As explained below, the trial court properly declined to instruct on justification because undisputed trial evidence showed that Crooks continued to possess the firearm well after any potential threat had ended despite many options for relinquishing possession. We therefore find no error in the trial court's criminal judgment.

The State concedes error with respect to the civil judgment for attorneys' fees because Crooks was not provided sufficient opportunity to be heard. We agree and therefore vacate that judgment and remand for further proceedings.

Facts and Procedural History

This case involves two versions of events so deeply inconsistent that telling both accounts is impractical. Because this appeal concerns

the sufficiency of evidence supporting a jury instruction on justification, we recount the version of events described by Defendant Nowlin Crooks, which is the more favorable version for his argument, and ignore the accounts of the State's witnesses, who offered a dramatically different version of events. *State v. Mercer*, 373 N.C. 459, 464, 838 S.E.2d 359, 363 (2020).

In August 2017, Crooks was walking to the store when he passed by David Harrison's home in a trailer park. Harrison was on his porch and invited Crooks inside for a drink. Crooks and Harrison began drinking bourbon. The two men had seven or eight shots of bourbon.

While the two men were drinking, Harrison suddenly stood up while only a few feet from Crooks, pulled a pistol out of his pocket, pointed it toward the wall near Crooks, and fired a shot at the wall. Before pulling out the gun, Harrison had not threatened Crooks in any way. Harrison also did not appear angry or upset. As soon as Harrison fired the shot at the wall, Crooks stood up, grabbed the pistol from Harrison, and left the trailer.

Crooks then went looking for a woman named Karen Tucker, who was dating his father. Crooks believed that Tucker likely would be sober and safely could take the gun from him. Crooks went to a nearby trailer and knocked on the door. Karen Tucker's daughter Lacey answered the door, but Crooks did not give the gun to Lacey because Crooks worried that she was high on drugs. Lacey's sister Echo also was present in the trailer. Echo told Crooks that Karen was nearby in Crooks's father's trailer. Crooks testified that he did not try to go to his father's trailer after learning that Karen was there because the "sheriffs got over there." Instead, Crooks waited with the gun in his possession, in the presence of Lacey and Echo, until Karen arrived. Crooks then gave Karen the gun.

Law enforcement who responded to the trailer park found a number of intoxicated people outside the trailers, including Harrison and Crooks. Harrison claimed that Crooks stole the gun from his living room while Harrison was in the bathroom. Karen Tucker's daughter Lacey told officers that Crooks pounded on the door to her trailer and, when she opened it, Crooks pointed the gun at her and went into the kitchen of the trailer with her while holding the gun to her head.

Crooks told the officers he took the gun from Harrison after Harrison held it close to him and fired a shot at the ceiling. None of the other witnesses heard any gun shots. Officers searched the inside of Harrison's trailer and did not find any bullet holes but did find a shell casing sitting on a coffee table.

The State later charged Crooks with a number of offenses, including possession of a firearm by a felon. At trial, Crooks requested a jury instruction on the defense of justification. The trial court denied the request. The jury found Crooks guilty of possession of a firearm by a felon. The trial court sentenced Crooks to 25 to 39 months in prison and also entered a civil judgment of $2,220 against Crooks for the attorneys' fees of his court-appointed counsel. Crooks filed a timely *pro se* notice of appeal that had a number of procedural defects. Crooks never served the notice of appeal on the State.

Crooks later petitioned for a writ of certiorari to remedy the defects with his notice of appeal. The State does not oppose the petition. In our discretion, we allow the petition and issue a writ of certiorari to address the merits of this appeal. *See* N.C. R. App. P. 21.

Analysis

I. Jury instruction on defense of justification

[1] Crooks first argues that the trial court erred by denying his request for a jury instruction on the defense of justification. Ordinarily, when a defendant requests specific jury instructions, the trial court "must give the instructions requested, at least in substance, if they are proper and supported by the evidence." *State v. Edwards*, 239 N.C. App. 391, 392, 768 S.E.2d 619, 620 (2015). On appeal, we review de novo whether the evidence supported the requested instruction. *Id.* at 393, 768 S.E.2d at 621.

The doctrine of justification is available as a defense to the charge of possession of a firearm by a felon. *State v. Mercer*, 373 N.C. 459, 463, 838 S.E.2d 359, 362 (2020). The justification defense is appropriate when, taken in the light most favorable to the defendant, there is evidence of each of the following factors:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Id. at 464, 838 S.E.2d at 363.

Here, the evidence at trial was insufficient to establish the first factor of the *Mercer* test. Even assuming that Harrison's drunken act of firing

his pistol into the wall or ceiling of his house represented an "impending threat of death or serious bodily injury" to Crooks, that threat was gone once Crooks left Harrison's trailer with the gun. But after that point, undisputed evidence showed that Crooks continued to possess the gun. He admitted at trial that he could have disposed of the gun in various ways, such as throwing it on a roof or hiding it somewhere until police arrived. More importantly, Crooks testified that, once he took the gun to the Tuckers' home and learned that Karen Tucker was not there, he continued to possess the gun and remain inside that home with Tucker's two daughters, even after they informed Crooks that their mother Karen was at a nearby trailer with Crooks's father.

When asked why he stayed instead of going to his father's trailer at that point, Crooks explained that it was because "the sheriffs got over there" and that he had no other explanation:

> Q: Okay. But you stayed at Karen's place until she arrived?
>
> A: Yes. . . .
>
> Q: Why didn't you leave and go to your dad's place?
>
> A: The sheriffs got over there.
>
> Q: How did you know that?
>
> A: Because Echo called them. That's the other sister.
>
> Q: Why didn't you leave to go give her the gun?
>
> A: I just didn't.

In light of this evidence, Crooks failed to show that his possession of the gun was justified because he was in imminent danger. The danger had ended. But Crooks chose to keep possession of the gun in the presence of other people. The law does not permit Crooks that choice; once the threat (assuming one actually existed) was gone, Crooks was required to relinquish possession of the firearm. *See State v. Craig*, 167 N.C. App. 793, 796–97, 606 S.E.2d 387, 389 (2005). Thus, the trial evidence did not support the first factor of the *Mercer* test and the trial court properly declined to provide a jury instruction on justification.

II. Attorneys' fees

[2] Crooks next argues that the trial court improperly imposed attorneys' fees without providing notice and an opportunity to be heard. The State concedes error and we agree.

Before imposing a judgment for the attorneys' fees of a defendant's court-appointed counsel, "the trial court must afford the defendant notice and an opportunity to be heard." *State v. Friend*, 257 N.C. App. 516, 522, 809 S.E.2d 902, 906 (2018). To afford the necessary opportunity to be heard, "trial courts should ask defendants—personally, not through counsel—whether they wish to be heard on the issue." *Id.* at 523, 809 S.E.2d at 907. "Absent a colloquy directly with the defendant on this issue, the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.*

Here, Crooks's counsel had not calculated the number of hours worked on the case at the time of sentencing. The trial court explained to Crooks at sentencing that "your attorney will calculate the time that he has expended in representing you. He will submit the total of his hours to me. I will sign what I feel to be a reasonable fee." The court later entered a civil judgment for $2,220 in attorneys' fees without first informing Crooks of that amount and providing Crooks the opportunity to address the entry of a civil judgment for that amount.

We agree with the parties that, under *Friend*, Crooks was not provided sufficient opportunity to be heard before entry of this civil judgment. We therefore vacate the civil judgment and remand for further proceedings on that issue in the trial court.

Conclusion

We find no error in the trial court's criminal judgment. We vacate the civil judgment for attorneys' fees and remand that matter for further proceedings.

NO ERROR IN PART; VACATED AND REMANDED IN PART.

Chief Judge McGEE and Judge HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JAMALL MONTE GLENN

No. COA20-65

Filed 17 November 2020

1. Robbery—with a dangerous weapon—other related offenses—identity of perpetrator—sufficiency of evidence

In a prosecution for robbery with a dangerous weapon and other related offenses, the trial court properly denied defendant's motion to dismiss where there was sufficient evidence showing defendant was the perpetrator of each offense, including the robbery victim's multiple descriptions of the robber and of his car—each one of which matched defendant and his car—and the victim's in-court identification of defendant as the robber. Although the victim identified someone other than defendant in a photo lineup, and defendant reported that his car was stolen from him at gunpoint on the night of the robbery, these contradictions in the evidence were for the jury to resolve.

2. Conspiracy—criminal—robbery with a dangerous weapon—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of conspiracy to commit robbery with a dangerous weapon where the evidence permitted a reasonable inference by the jury that defendant conspired with two other people to commit the robbery. Specifically, one of the victims described three individuals threatening him and his wife at gunpoint, defendant shooting him before taking his phone and wallet, and the three individuals fleeing together in defendant's car; additionally, law enforcement apprehended one of the individuals inside the car after it crashed, found the gun along with the stolen items inside the car, and secured surveillance footage of defendant and his girlfriend fleeing from the crash site.

3. Evidence—relevance—impeachment—witness's civil suit against third party—interest in outcome of defendant's trial

In a prosecution for robbery with a dangerous weapon and other related offenses, the trial court properly sustained the State's objection on relevance grounds when defendant, on cross-examination, asked the victim about a civil lawsuit he filed against the owner of the parking lot where the armed robbery took place (alleging inadequate security), where defendant was identified in the lawsuit as

the robber. Because it was unnecessary to prove that defendant was the robber in order to prevail against the parking lot owner in the civil suit, the pendency of that suit did not prove the victim's interest in the outcome of defendant's trial, and therefore was inadmissible to impeach the victim.

4. Identification of Defendants—in-court—due process rights—witness credibility

In a prosecution for robbery with a dangerous weapon and other related offenses, there was no plain error where the trial court did not intervene ex mero motu to exclude the robbery victim's in-court identification of defendant as the perpetrator of the offenses. The identification did not violate defendant's due process rights where nothing indicated that it had been tainted by an "impermissibly suggestive" pre-trial identification procedure. Furthermore, defendant had ample opportunity to test the reliability of the in-court identification by cross-examining the victim about any improper factors that may have influenced him when he identified defendant.

Appeal by Defendant from judgments entered 22 July 2019 by Judge Lisa C. Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 September 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Adrian W. Dellinger, for the State.

Massengale & Ozer, by Marilyn G. Ozer, for Defendant.

COLLINS, Judge.

Defendant Jamall Monte Glenn appeals from judgments entered upon jury verdicts of guilty of robbery with a dangerous weapon, two counts of assault with a deadly weapon with intent to kill and inflicting serious injury, two counts of attempted first-degree murder, conspiracy to commit robbery with a dangerous weapon, and possession of a firearm by a felon. Defendant argues that (1) there was insufficient evidence of both his identity as the perpetrator and of a conspiracy to commit robbery with a dangerous weapon; (2) the trial court erred by sustaining the State's objection to a question asked on cross-examination concerning a civil lawsuit filed by a witness; and (3) the trial court committed plain error by failing to strike ex mero motu an in-court identification of Defendant as the perpetrator. We discern no error.

I. Procedural History

On 3 January 2017, Defendant was indicted on two counts of attempted first-degree murder, two counts of robbery with a dangerous weapon, two counts of assault with a deadly weapon with intent to kill and inflicting serious injury, one count of conspiracy to commit robbery with a dangerous weapon, one count of possession of a firearm by a felon, and one count of resisting a public officer. Before trial, the State dismissed the misdemeanor resisting arrest count and one count of robbery with a dangerous weapon. Defendant was tried before a jury in Mecklenburg County Superior Court between 15 and 22 July 2019. At the conclusion of the State's evidence, Defendant moved to dismiss all charges. The trial court denied the motion. Defendant did not present any evidence and renewed his motion to dismiss, which the court again denied. The jury found Defendant guilty of all charges, and the trial court sentenced Defendant to consecutive prison terms of 180 to 228 months, 180 to 228 months, and 60 to 84 months. Defendant gave notice of appeal in open court.

II. Factual Background

The evidence at trial tended to show the following: Between 7:00 and 7:30 p.m. on 17 December 2016, Bruce and Joanne Parker went to dinner with a group of friends in Charlotte, North Carolina. After dinner, the Parkers walked to a nearby brewery. Between 10:30 and 10:45 p.m., the Parkers left the brewery to return to their pickup truck, which they had parked before dinner. The parking lot was large, dark, and had few other cars.

As Mr. Parker approached, he saw a medium-sized dark-colored car that had backed into the parking spot next to the driver's side of their truck. Mrs. Parker saw at least three people in the car. Mr. Parker first went to the passenger side of the truck to open the door for Mrs. Parker. Once Mr. Parker had moved around to the driver's side of the truck, he heard someone at the back of the dark-colored car, near its trunk, ask "Hey, man, do you have a jack?" Mr. Parker saw a silhouette of a person at the back of the car; Mrs. Parker saw "a black individual [who] had long dreadlocks." Mr. Parker responded that he did not have a jack.

Immediately after, Mr. Parker saw the driver's side door of the car opening. He saw a "large black male . . . [who] had a little difficulty getting out of [the car] because he was such a large man." Mr. Parker estimated that the man was approximately six feet two to six feet three inches tall and described him as heavy set, with short hair, and having a "kind of a large face with puffy cheeks."

After exiting the driver's side door of the car, the man told Mr. Parker, "Don't resist." This was a different voice than had asked for a jack. Mr. Parker responded by putting his hands up and saying, "Here, take what you want." At that point, Mr. Parker estimated that the man who had exited the driver's side of the car was a foot to a foot and a half away from him. The man forced Mr. Parker to the ground. Once he was on the ground, Mr. Parker was shot in his side. At that time, he saw only the man who had exited the car. After being shot, Mr. Parker handed the man his wallet and his phone.

Mrs. Parker then started to come around to the driver's side of the truck and asked her husband if he was okay. At that point, she heard someone say to her, "shut the f*#k up, bi*#h." When she reached the back of the truck, she saw a "very large" black male "holding a gun in his right hand" leaning over the open driver's side door of the car. She then felt a searing pain in her abdomen as she was shot.

That night, two officers with the Charlotte Mecklenburg Police Department, Shabeer Mohammad and Bret Balamucki, were preparing for off-duty work. While driving in Balamucki's police car, the officers heard a gunshot nearby. They turned into the parking lot where they believed the gunshot occurred and Balamucki saw Mrs. Parker falling. Mohammad exited the patrol car and observed Mr. Parker hunched over. The dark-colored car was exiting the parking lot, approximately fifty to sixty feet away, and Mr. Parker pointed out the car to Mohammad and identified the driver as the shooter. Mohammad saw a "black Toyota Camry with a large black male wearing a black jacket on the driver's side of the vehicle" who was "either putting something in the vehicle or trying to enter the vehicle." Balamucki observed a "large black male wearing a black jacket" who was "very husky, with short hair" entering the car and throwing something in the floorboard behind the driver.

Balamucki, still in his patrol car, began to pursue the Camry as it drove away. He followed the Camry out of the parking lot and maintained pursuit without losing sight until it collided with another car near Novant Health Presbyterian Hospital, crashed into a barrier, and came to a stop. Balamucki approached the accident and "observed two African-American males running from the car" towards the hospital. He could not tell what seat each of the men had gotten out of. He could tell, however, that one of the men running toward the hospital parking garage was the same person whom Mr. Parker had identified as the shooter and who had gotten into the back of the Camry.

Balamucki exited his car and pursued one of the men, who had dreadlocks and was wearing a peacoat-style black jacket. As he did so,

he saw the other man going into the parking garage. Balamucki apprehended the man in the peacoat, who was identified as Antonio Worthy. Surveillance video showed two persons in the hospital garage, a "heavy set, tall black male with a short haircut" and "a light-skinned black female with a heavy coat on, long hair, [and] dark colored pants." The two were recorded exiting the garage at 12:16 a.m.

On the driver's seat floorboard of the crashed car, officers found the gun used to shoot the Parkers. Mr. Parker's cell phone and wallet were also recovered from the car, as was a purse and driver's license belonging to Ebonee Ward.

While Balamucki was pursuing the Camry, the Parkers were taken to the hospital. Before being taken to surgery, Mr. Parker again gave a description of the shooter. Mr. Parker recalled describing the shooter as "a black male . . . approximately 280 pounds, 6-foot-2, and short hair." Officer Joseph Ellis, who briefly spoke with Mr. Parker in an elevator at the hospital, testified that Mr. Parker described the shooter as "[a] big black guy," and that Mr. Parker agreed that the shooter looked six foot five and 300 pounds. During the investigation, Mr. Parker gave officers a description of the shooter as having "a large face" and being "heavyset" with a "round face, with large facial features," and "puffy cheeks." He could not recall what the shooter was wearing.

At around 1:00 a.m. on 18 December, Defendant called the police to report a carjacking. When officers arrived to take the report, Ms. Ward was present and Defendant identified her as his girlfriend. Defendant reported that at around 9:00 p.m. the previous night he was pumping gas when someone held him at gunpoint, made Ms. Ward and him remove their clothes, and took his 2013 black Toyota Camry and his belongings. The paperwork and vehicle identification number that Defendant provided for the Camry showed that it was the same Camry involved in the shooting of the Parkers. After Defendant gave another statement concerning the alleged carjacking, officers noticed multiple inconsistencies in the details of the report.

Approximately three to four days after the shooting, a detective with the Charlotte-Mecklenburg Police Department came to Mr. Parker's hospital room and asked him to look at a photo lineup. At that time, Mr. Parker was unsure that he could identify the shooter, but agreed to look at the lineup. Mr. Parker identified one of the six persons in the photo lineup as the shooter. Though Defendant's photo was in the lineup, Mr. Parker identified another person. Mr. Parker did not learn that he had not identified Defendant until the day prior to the trial.

On redirect examination, Mr. Parker indicated that he was able to make out the shooter's face during the attack. The prosecution asked Mr. Parker, "Whose face were you able to make out?" Mr. Parker then, without objection, identified Defendant in the courtroom. Mr. Parker indicated that Defendant was "pretty much the same man as he was that night," only that he "appear[ed] a little bit thinner."

III. Discussion

A. Sufficiency of the Evidence

Defendant first argues that the trial court erred by denying his motion to dismiss because there was insufficient evidence both that he was the perpetrator of the offenses, and that there was a conspiracy to commit robbery with a dangerous weapon. We disagree.

This court reviews a trial court's denial of a motion to dismiss for insufficient evidence de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "Upon defendant's motion for dismissal, the question for the court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

> In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence.

Fritsch, 351 N.C. at 378-79, 526 S.E.2d at 455 (quotation marks and citations omitted).

1. Identity of the Perpetrator

[1] The State introduced the following evidence at trial that Defendant was the perpetrator of the attack: When the officers arrived on scene, Mr. Parker pointed to a black Toyota Camry with a temporary license plate

and a man nearby and said, "That's the guy who shot me." Balamucki looked and saw "a large black male wearing a black jacket, with a black hood. Darker pants. And he's . . . very husky, with short hair." Likewise, Mohammad saw Mr. Parker point and heard him say, "He just shot me." When Mohammad looked, he saw "a black Toyota Camry with a large black male wearing a black jacket on the driver's side of the vehicle. Kind of either putting something in the vehicle or trying to enter the vehicle." That night, Mr. Parker told officers that his attacker "was approximately 6-2. Approximately 280 pounds. A black male. And short hair." While Mr. Parker was hospitalized, he described the shooter as "a large male" with "a large face" who was "heavy set" with "puffy cheeks."

These descriptions matched a person shown on surveillance footage walking through the Novant Health Presbyterian Hospital parking garage after the black Toyota Camry collided with another car near the hospital, crashed into a barrier, and came to a stop. Defendant was the owner of the black Toyota Camry.

Additionally, Mr. Parker identified Defendant as the shooter in court:

> Q: . . . Were you able to make out anyone's face?
>
> A: Yes.
>
> Q: All right. Whose face were you able to make out?
>
> A: Jamall Glenn.
>
> Q: And why do you say that now?
>
> A: Because I can recognize him in this courtroom.
>
> . . . .
>
> Q: . . . Why after now, sitting here today and seeing him, why do you now say you recognize him?
>
> A. Because he's almost—he's pretty much the same man as he was that night.
>
> Q: Okay. Does he appear different to you now that you've seen him for the first time in almost three years?
>
> A: He appears a little bit thinner.

Mr. Parker testified that he was "maybe a foot, foot and a half" from the shooter during the attack and could make out his attacker's face.

Although Defendant reported that his car was stolen from him at gunpoint on the night of the attack and Mr. Parker identified someone other

than Defendant as the shooter in a photo lineup, such contradictions and discrepancies in the evidence "do not warrant dismissal of the case but are for the jury to resolve." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

Defendant also argues that the forensic evidence contradicts his identity as the driver of the Camry and the shooter. This argument is unavailing. Though the DNA samples found in the car and on the gun do not conclusively match Defendant, they are not inconsistent with Defendant either.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence to submit the question of whether Defendant was the perpetrator to the jury. Accordingly, the trial court did not err by denying the motion to dismiss.

2. Conspiracy to Commit Robbery with a Dangerous Weapon

[2] "A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975). While an agreement may be shown by direct proof of an express agreement, it is "generally inferred from an analysis of the surrounding facts and circumstances." *State v. Fleming*, 247 N.C. App. 812, 819, 786 S.E.2d 760, 766 (2016). "The proof of a conspiracy 'may be, and generally is, established by a number of indefinite acts, each of which, standing alone, might have little weight, but, taken collectively, they point unerringly to the existence of a conspiracy.' " *State v. Lawrence*, 352 N.C. 1, 25, 530 S.E.2d 807, 822 (2000) (citation omitted).

The execution of an attack in a coordinated manner and joint flight after the attack have been held sufficient evidence to survive a motion to dismiss a conspiracy charge. *State v. Lamb*, 342 N.C. 151, 155-56, 463 S.E.2d 189, 191 (1995); *State v. Miles*, 833 S.E.2d 27, 31 (N.C. Ct. App. 2019). In *Lamb*, our Supreme Court found sufficient evidence of a conspiracy to commit robbery with a dangerous weapon where "defendant met with two other men, one of whom was armed" and "the three men drove to the home of the victim . . . left the vehicle and entered the victim's home, robbed the victim, and shot him." 342 N.C. at 155-56, 463 S.E.2d at 191. Similarly, in *Miles* this Court found sufficient evidence of a conspiracy to commit robbery with a dangerous weapon where defendant was one of four people in two cars at the scene of the crime, one of the cars honked the horn to get the victim's attention, defendant approached the victim with a weapon and exchanged gunfire, three men including defendant were witnessed fleeing the scene, and defendant got back into one of the cars. 833 S.E.2d at 31.

As in *Lamb* and *Miles*, the State has introduced sufficient evidence of a conspiracy to commit robbery with a dangerous weapon. Viewing the evidence in the light most favorable to the state, a reasonable juror could conclude that Defendant acted in coordination with Mr. Worthy and Ms. Ward to rob the Parkers with a dangerous weapon. Mr. Parker heard the voice of one person ask for a jack and the voice of another from his attacker. Once the robbery was underway, Mr. Parker heard two people outside of the car: the man who attacked him, and another person near the car's trunk area. After knocking Mr. Parker to the ground, the assailant shot him and took his phone and wallet. Following the shooting and robbery, the three persons fled in the car together. When the car crashed, police apprehended Mr. Worthy and found the gun, Mr. Parker's phone, and Mr. Parker's wallet in the car. Meanwhile, Defendant and Ms. Ward continued to flee together through the hospital parking garage. They later called police claiming that Defendant's car was stolen. When a detective showed Defendant surveillance video from the hospital, he responded that "It wasn't me driving," a tacit admission that he was in the car. Taken together, these facts are sufficient to permit an inference by the jury that Defendant was a member of a conspiracy to commit robbery with a dangerous weapon. The trial court therefore did not err by denying the motion to dismiss that charge.

B. Testimony Concerning the Civil Lawsuit

[3] Defendant also argues that the trial court erred by sustaining the State's objection to Defendant's question concerning a civil lawsuit filed by the Parkers. We disagree.

The admissibility of evidence under N.C. Gen. Stat. § 8C-1, Rule 401, is governed by a threshold inquiry into its relevance. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2019). "Trial court rulings on relevancy technically are not discretionary." *State v. Holmes*, 263 N.C. App. 289, 302, 822 S.E.2d 708, 720 (2018), *review denied*, 372 N.C. 97, 824 S.E.2d 415 (2019). "Whether evidence is relevant is a question of law . . . [and] we review the trial court's admission of the evidence de novo." *State v. Kirby*, 206 N.C. App. 446, 456, 697 S.E.2d 496, 503 (2010). Even though we review these rulings de novo, we give "great deference on appeal" to trial court rulings regarding whether evidence is relevant. *State v. Allen*, 828 S.E.2d 562, 570 (N.C. Ct. App.), *appeal dismissed*, *review denied*, 373 N.C. 175, 833 S.E.2d 806 (2019).

On cross-examination, Defendant asked Mr. Parker, "And [Mr. DeVore's] the attorney that you and your wife have hired and have filed a civil lawsuit in this case; correct?" The State objected and the jury was excused. Through argument of counsel and the trial court's questioning, it was determined that the Parkers had filed a lawsuit alleging ineffective or inadequate security against the owner of the parking lot in which the attack at issue took place. Defendant was identified in the lawsuit as the assailant.

Defense counsel explained that he only intended to ask that single question, that he may request a jury instruction on "a person interested in the outcome of the case[,]" and that "we know that in that circumstance, that's a monetary thing." Defendant further explained, "I simply want [Mr. Parker] to acknowledge, which he has, that there is a civil suit."

In ruling on the objection, the trial court stated:

> [A]s I would understand the issue for the civil complaint, liability is being argued on the basis that there was a violent armed robbery and attack in this parking lot.
>
> It's not necessary to prove in that civil lawsuit that it was [Defendant], but simply that that attack occurred. And that's what would potentially give rise to liability on the part of the parking lot owner or management company. So whether or not [Defendant] was involved is, I think, actually immaterial to the lawsuit.
>
> Because his involvement is . . . immaterial in that lawsuit and . . . the defense is not contesting that the robbery and shooting occurred. That's what would give rise to the liability [in the civil suit]. Based on that analysis I find that it's not material to this case, therefore not relevant.[1]

The trial court therefore sustained the State's objection and instructed the jury to disregard Defendant's last question and the witness's last statement.[2]

On appeal Defendant argues, as he did at trial, that the civil lawsuit was relevant because it showed that the Parkers had an interest in the

1. The trial court stated that the ruling did not necessarily apply if defense counsel wished to impeach Mr. Parker's criminal trial testimony with statements he had made under oath in the civil complaint. Defense counsel stated that he would not be doing so, and did not attempt to do so at trial.

2. The record does not clearly reflect whether Mr. Parker answered the question concerning the civil suit.

outcome of the criminal prosecution. In conducting a de novo review of the trial court's decision, we agree with its analysis on this issue. "A party to an action or proceeding, either civil or criminal, may elicit from an opposing witness on cross-examination particular facts having a logical tendency to show that the witness is biased against him or his cause, or that the witness is interested adversely to him in the outcome of the litigation." *State v. Hart*, 239 N.C. 709, 711, 80 S.E.2d 901, 902 (1954). Our courts have consistently held that where a witness for the prosecution has filed a civil suit for damages *against the criminal defendant himself*, the pendency of the suit is admissible to impeach the witness by showing the witness's interest in the outcome of the criminal prosecution. *See id.* at 711, 80 S.E.2d at 902; *State v. Dixon*, 77 N.C. App. 27, 31-32, 334 S.E.2d 433, 436 (1985); *State v. Grant*, 57 N.C. App. 589, 591, 291 S.E.2d 913, 915 (1982).

Defendant did not seek to question Mr. Parker about a suit the Parkers had filed against *Defendant*, but instead sought to question Mr. Parker about a suit the Parkers had filed against *a third party*–the parking lot owner. As the trial court explained, it is not necessary for the Parkers to prove in the civil suit that Defendant was the assailant, but simply that the attack occurred. Defendant's alleged involvement in the attack was immaterial to the civil suit. Thus, unlike in *Hart*, *Dixon*, and *Grant*, the pendency of the civil suit did not show Mr. Parker's interest in the outcome of the criminal prosecution and was accordingly not admissible to impeach the witness.

Defendant also argues, for the first time on appeal, that the civil lawsuit was relevant to Mr. Parker's in-court identification of Defendant. Specifically, he asserts that the "jury could not properly weigh [Mr. Parker's] identification of [Defendant] as the assailant without knowledge of what Mr. Parker had been told during preparation for the civil lawsuit." Defendant contends that the jury should have been able to consider the civil suit because it "showed Mr. Parker more likely than not had garnered knowledge from the civil investigation into the incident which tainted his identification of Mr. Glenn at the 2019 criminal trial."

Defendant did not raise this argument as to relevance at trial and it is not preserved for our review. "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). "[I]t is well settled in this jurisdiction that defendant cannot argue for the first time on appeal [a] new ground for admissibility that he did not present to the trial court."

State v. Sharpe, 344 N.C. 190, 195, 473 S.E.2d 3, 6 (1996). Defendant cannot now argue that the civil suit was relevant to Mr. Parker's in-court identification. Accordingly, the trial court did not err by sustaining the State's objection.

C. In-Court Identification

[4] Defendant's remaining argument is that the trial court plainly erred by failing to exclude ex mero motu Mr. Parker's in-court identification. Specifically, Defendant asserts that the identification was tainted such that its admission violated his rights to due process and a fair trial. We disagree.

As an initial matter, the State argues that Defendant has failed to preserve this issue for our review because he did not move to suppress the identification prior to trial. Defendant was not seeking to suppress a pre-trial identification of Defendant; the need to exclude the in-court identification did not arise until Mr. Parker identified Defendant at trial. Thus, "defendant did not have reasonable opportunity to make the motion before trial[,]" N.C. Gen. Stat. § 15A-975(a) (2019), and Defendant was not required to file a motion to suppress the in-court identification to preserve the issue.

Defendant was, however, required to timely object to the in-court identification, N.C. R. App. P. 10(a)(1); this he failed to do. However, because Defendant has "specifically and distinctly contended" that the admission of the identification "amount[ed] to plain error," we will review the admission of the identification for plain error despite Defendant's failure to object at trial. N.C. R. App. P. 10(a)(4).[3]

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's

3. Although Defendant argues both plain error and that the trial court failed to intervene ex mero motu, this elevated ex mero motu standard applies to opening and closing arguments to the jury. *See, e.g.*, *State v. Davis*, 349 N.C. 1, 23, 506 S.E.2d 455, 467 (1998) ("Where, as here, defendant failed to object to the arguments at trial, defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene ex mero motu."). We will review this issue for plain error, the appropriate analysis for unpreserved evidentiary issues. *State v. Ridgeway*, 137 N.C. App. 144, 147, 526 S.E.2d 682, 685 (2000) ("Where . . . a criminal defendant fails to object to the admission of certain evidence, the plain error analysis, rather than the ex mero motu or grossly improper analysis, is the applicable standard of review.").

finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

> [T]he plain error rule . . . is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

Odom, 307 N.C. at 660, 300 S.E.2d at 378 (citation omitted).

Our Supreme Court has stated that

> [i]dentification evidence must be suppressed on due process grounds where the facts show that the pretrial identification procedure was so suggestive as to create a very substantial likelihood of irreparable misidentification. . . . If it is determined that the pretrial identification procedure is impermissibly suggestive the court must then determine whether the suggestive procedure gives rise to a substantial likelihood of irreparable misidentification.

State v. Powell, 321 N.C. 364, 368-69, 364 S.E.2d 332, 335 (1988). The United States Supreme Court has clarified that "what triggers due process concerns is police use of an unnecessarily suggestive identification procedure . . . ." *Perry v. New Hampshire*, 565 U.S. 228, 232 n.1 (2012). "The Constitution . . . protects a defendant against a conviction based on evidence of questionable reliability, not by prohibiting introduction of the evidence, but by affording the defendant means to persuade the jury that the evidence should be discounted as unworthy of credit." *Id.* at 237.

Here, Defendant does not contend that the pre-trial photo lineup conducted by a detective while Mr. Parker was hospitalized was impermissibly suggestive, nor does Defendant challenge any pre-trial identification procedure employed by law enforcement. Instead, on appeal, Defendant argues that the in-court identification was tainted by Mr. Parker's

exposure to media coverage of the case, his filing of a civil lawsuit which named Defendant as the assailant, the lapse of time, and his identification of someone other than Defendant in the photo lineup. Accordingly, Defendant's argument does not trigger due process concerns.

At trial, Mr. Parker testified on direct examination that he was one to one and a half feet away from his assailant, he was able to make out the assailant's face, and the assailant was Defendant. Defendant did not object. Following the in-court identification, Defendant cross-examined Mr. Parker concerning his exposure to media coverage of the case, the amount of time that had passed, the fact that Mr. Parker did not recant the initial identification in the photo lineup, and the circumstances under which Mr. Parker gave the descriptions and completed the photo lineup. During this cross-examination, Defendant did not seek to impugn Mr. Parker's in-court identification on the basis that it was tainted by the Parkers' civil lawsuit, as discussed above. The trial court subsequently instructed the jury that they were "the sole judges of believability of witnesses" and "must decide for [them]selves whether to believe the testimony of any witness."

Defendant had the opportunity to test the reliability of Mr. Parker's in-court identification "through the rights and opportunities generally designed for that purpose[,]" *Perry*, 565 U.S. at 233, and the defects of the in-court identification Defendant complains of were solely issues of credibility for the jury to resolve, *State v. Simpson*, 327 N.C. 178, 189, 393 S.E.2d 771, 777 (1990) (initial misidentification by witness did "not disqualify him from thereafter testifying that he saw defendant on the night of the murder"); *State v. Miller*, 270 N.C. 726, 732, 154 S.E.2d 902, 906 (1967) ("Where there is a reasonable possibility of observation sufficient to permit subsequent identification, the credibility of the witness' identification of the defendant is for the jury . . . .").

Without any indication that the in-court identification was tainted by an impermissibly suggestive pre-trial identification procedure, there was no error, let alone plain error, in admitting Mr. Parker's in-court identification.

IV. Conclusion

Because there was sufficient evidence of Defendant's identity as the perpetrator and that Defendant conspired to commit robbery with a dangerous weapon, the trial court did not err by denying his motions to dismiss. The trial court did not err by concluding that cross-examination concerning the Parkers' civil suit was irrelevant. Without a showing that the police used impermissibly suggestive procedures in a pre-trial

identification, the trial court did not err by admitting Mr. Parker's in-court identification; the credibility of that identification was a question for the jury.

NO ERROR.

Judges STROUD and MURPHY concur.

STATE OF NORTH CAROLINA
v.
ZACHARY DALLAS McDARIS, DEFENDANT

No. COA20-7

Filed 17 November 2020

1. Burglary and Unlawful Breaking or Entering—first-degree burglary—underlying felony—breaking or entering with the intent to terrorize or injure

There was insufficient evidence to support defendant's conviction for first-degree burglary where the trial court, acting as finder of fact, found that the "with the intent to commit a felony therein" element was satisfied by the underlying felony of breaking or entering with the intent to terrorize or injure (N.C.G.S. § 14-54(a1)). Section 14-54(a1) could not be the underlying felony here because it would require that defendant broke into the victims' residence with the intent to break into another residence and therein terrorize the victims.

2. Burglary and Unlawful Breaking or Entering—first-degree burglary—underlying felony—breaking or entering with the intent to terrorize or injure—reversal—remedy

Where the Court of Appeals held that the felony of breaking or entering with the intent to terrorize or injure (N.C.G.S. § 14-54(a1)) could not logically serve as the underlying felony of first-degree burglary, the appropriate remedy was remand for entry of judgment on the lesser-included offense of misdemeanor breaking or entering. Even though the trial court, acting as finder of fact, found that all the elements of N.C.G.S. § 14-54(a1) were met, that offense was not charged in the indictment and was not a lesser-included offense of the charged offense (first-degree burglary).

Judge YOUNG concurring in result only.

Appeal by Defendant from judgment entered 6 August 2019 by Judge Daniel A. Kuehnert in Caldwell County Superior Court. Heard in the Court of Appeals 12 August 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Hugh A. Harris, for the State.

Mark L. Hayes for defendant-appellant.

MURPHY, Judge.

The trial court erred in denying a motion to dismiss a first-degree burglary charge when it considered N.C.G.S. § 14-54(a1) as the felony underlying the first-degree burglary charge and the evidence failed to support this theory, which was used as the sole basis for the conviction. We reverse Defendant's conviction and remand for entry of judgment on the lesser included offense of misdemeanor breaking or entering, which was supported by the evidence.

BACKGROUND

At approximately 1:00 a.m. on 1 January 2018, Defendant Zachary Dallas McDaris ("Defendant") woke Roy Ridenhour ("Mr. Ridenhour") and his wife, Cynthia Ridenhour ("Mrs. Ridenhour"), by loudly banging on the front door of their residence in Hickory. Mr. Ridenhour looked out the window and thought a neighbor was at the front door. When Mr. Ridenhour went to the front door and flipped the deadbolt, Defendant violently pushed the front door open. The door struck Mr. Ridenhour and knocked him backwards approximately six feet. After shoving the door open, Defendant entered the house and stated, "I'm your savior. You're going to hell for your sins."

Defendant then began beating Mr. Ridenhour, who shouted for his wife to call the police and grab his pistol. Defendant struck Mr. Ridenhour multiple times, causing him to fall down a flight of stairs and knocking him unconscious. Mr. Ridenhour sustained a laceration to his head, a large knot on the back of his head, and bruises and cuts to his shoulder and back. Mrs. Ridenhour entered the hall, pointed a gun at Defendant, and told him to leave. In response, Defendant exited the house, and Mr. Ridenhour regained consciousness and locked the door. Defendant briefly walked in the front yard but returned and began banging on the front door again. Caldwell County Sheriff's Deputies arrived at the scene and detained Defendant at the front door.

Following these events, Defendant was indicted for first-degree burglary and the lesser included offense of felonious breaking and entering. Defendant's indictment read:

> The jurors for the State upon their oath present that on or about [1 January 2018], in [Caldwell County] [Defendant] unlawfully, willfully and feloniously did during the nighttime hours, break and enter a building actually occupied by Roy Ridenhour and wife, Cynthia Gail Ridenhour, used as a residence located at [Street Address], with the intent to commit a felony or larceny therein. This act was in violation to [first-degree burglary and felonious breaking and entering under N.C.G.S. § 14-54(a)].

At a pretrial hearing on 5 August 2019, Defendant waived his right to a jury trial in accordance with N.C.G.S. § 15A-1201(b), and a bench trial began the following day. After the State presented its evidence, Defendant unsuccessfully moved to dismiss for insufficient evidence. Defendant presented evidence and renewed his motion to dismiss. During both the motion and renewed motion, Defendant argued the State had not presented sufficient evidence of his intent to commit an underlying felony when he entered the Ridenhour house, as required for first-degree burglary. *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996).

The trial court denied both the motion to dismiss and renewed motion. During the subsequent charge conference, there was a discussion of potential underlying felonies to satisfy the intent to commit a felony therein requirement of first-degree burglary, including N.C.G.S. § 14-54(a1), assault causing serious bodily injuries, and attempted murder; however, the trial court's explicit reasoning for denying Defendant's renewed motion to dismiss was unclear.

In suggesting potential underlying felonies, the State stated:

> The first one I would contend would be [N.C.G.S. § 14-54(a1)]. And I would note when we have the felony of breaking or entering, I would contend that that is a felony that, when the language says a felony or larceny therein, it can be considered. And I would point out to the Court that [N.C.G.S. § 14-54(a1)] is the specific language where it says, if any person who breaks or enters any building with the intent to terrorize or injure an occupant of a building is guilty of a Class H felony. Now, that is a separate or distinct way of violating, breaking or entering a building,

> because [N.C.G.S. § 14-54(a)], I would argue to the Court, is our more traditional approach. And it says any person who breaks or enters any building with the intent to commit any felony or larceny therein shall be punished as a Class H felony.
>
> . . .
>
> Now, what else could you consider if this were being argued to the jury? Assault inflicting serious bodily injury. Another felony is attempted murder.

The trial court stated if it were a jury trial it would instruct a jury on, and as finder of fact it was considering, larceny, attempted murder, and N.C.G.S. § 14-54(a1).[1] However, the trial court, as finder of fact, convicted Defendant of first-degree burglary solely on the basis of N.C.G.S. § 14-54(a1), stating

> So I have no doubt a jury could have found that . . . [D]efendant entered the house to attempt murder or a larceny or something to that effect, but I think what's important to the Court is . . . and from the Court's standpoint -- I'm saying this because if the case does get appealed, . . . I want the appellate court to understand that this Court, sitting as a jury, right or wrong, believed that . . . .
>
> That [] [D]efendant . . . committed first-degree burglary by committing the felony of [N.C.G.S. § 14-54(a1)] when he broke and entered into the building with the intent to terrorize and injure the occupant, because that's what happened. . . .
>
> . . .
>
> So . . . the Court doesn't have any reasonable doubt that [N.C.G.S. § 14-54(a1)] occurred and that [] [D]efendant intended to injure the occupants of the house once he broke in, at a minimum. He certainly terrorized them, and he may have certainly -- I think that statute applies, in other words. So the Court finds [] [D]efendant guilty of first-degree burglary.

Defendant entered written notice of appeal on 9 August 2019. On appeal, Defendant argues the trial court erred in denying his motion to

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1. The trial court ultimately concluded the assault inflicting serious bodily injury felony "wasn't brought up," and did not consider it.

dismiss, as breaking and entering with intent to terrorize cannot be the underlying felony for first-degree burglary.

ANALYSIS

We review the "trial court's denial of [Defendant's] motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). "When ruling on a defendant's motion to dismiss, the trial court must determine whether [the State presented sufficient] evidence (1) of *each essential element* of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Id.* (emphasis added); *see* N.C.G.S. § 15A-1227 (2019). To be sufficient, the State must present "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980).

"As always, [in our review of a ruling on] a motion to dismiss, we must view the evidence in the light most favorable to the [S]tate and allow the [S]tate every reasonable inference that may arise upon the evidence, regardless of whether it is circumstantial, direct, or both." *State v. Cummings*, 46 N.C. App. 680, 683, 265 S.E.2d 923, 925, *aff'd*, 301 N.C. 374, 271 S.E.2d 277 (1980).

A. Underlying Felony

[1] Here, Defendant only challenges the sufficiency of the evidence supporting the felonious intent element of first-degree burglary, specifically arguing, *inter alia*, that N.C.G.S. § 14-54(a1) cannot be an underlying felony for first-degree burglary because "grammatically and logically, the initial breaking and entering must be distinct from the crime which a burglar subsequently intends to commit therein." We limit our analysis to the element of felonious intent because Defendant challenges no other element on appeal.

Also, like our Supreme Court did in *State v. Reese* when analyzing a motion to dismiss, we separately analyze the independent theories for the underlying felony element used in Defendant's first-degree burglary jury charge in evaluating whether the trial court erred in denying Defendant's motion to dismiss. *State v. Reese*, 319 N.C. 110, 144-45, 353 S.E.2d 352, 371-72 (1987), *overruled in part on other grounds by State v. Barnes*, 345 N.C. 184, 233, 481 S.E.2d 44, 71 (1997). However, in determining the acting with the intent to commit therein element of first-degree burglary, the trial court acquitted Defendant of the felonies of attempted murder, assault inflicting serious bodily injury, and larceny when it found beyond a reasonable doubt Defendant had only

committed N.C.G.S. § 14-54(a1). *See State v. Smith*, 170 N.C. App 461, 473, 613 S.E.2d 304, 313 (2005), *aff'd as modified by* 360 N.C. 341, 626 S.E.2d 258 (2006) (quoting *Francis v. Franklin*, 471 U.S. 307, 313, 85 L.Ed.2d 344, 352 (1985)) ("The Due Process Clause of the Fourteenth Amendment 'protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' ").

Therefore, we examine the sufficiency of the evidence presented at trial supporting the State's theory that Defendant had felonious intent, as required by first-degree burglary, to commit the felony of breaking or entering with intent to terrorize or injure under N.C.G.S. § 14-54(a1) therein. *See State v. Parker*, 54 N.C. App. 522, 525, 284 S.E.2d 132, 134 (1981) ("[The d]efendant first assigns error to the trial court's denial of his motion to dismiss the charges of breaking or entering and larceny. . . . We [] note that no prejudicial error could have been committed by the court's denial of the defendant's motion to dismiss the breaking or entering charges, because [the] defendant was acquitted of these charges. Our sole task under this assignment of error is then to determine whether the trial court erred in failing to grant the motion to dismiss the larceny charges.").

> [I]n order for a defendant to be convicted of first[-]degree burglary, the State must present substantial evidence that there was '(i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony *therein*.'

State v. Goldsmith, 187 N.C. App. 162, 165, 652 S.E.2d 336, 339 (2007) (quoting *State v. Singletary*, 344 N.C. 95, 101, 472 S.E.2d 895, 899 (1996)); *see* N.C.G.S § 14-51 (2019) ("If the crime be committed in a dwelling house . . . and any person is in the actual occupation of any part of said dwelling house . . . at the time of the commission of such crime, it shall be burglary in the first[-]degree."). "The intent to commit a felony must exist at the time of entry." *State v. Norris*, 65 N.C. App. 336, 338, 309 S.E.2d 507, 509 (1983). "Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Baskin*, 190 N.C. App. 102, 109, 660 S.E.2d 566, 572 (2008).

Under N.C.G.S. § 14-54(a1), "[a]ny person who breaks or enters any building with intent to terrorize or injure an occupant of the building is guilty of a Class H felony." N.C.G.S. § 14-54(a1) (2019). In order to

evaluate N.C.G.S. § 14-54(a1) as an underlying felony for first-degree burglary, we must read the requirements of N.C.G.S. § 14-54(a1) in conjunction with the relevant elements of first-degree burglary. For N.C.G.S. § 14-54(a1) to satisfy the felonious intent element of first-degree burglary, a defendant must (1) break and enter a dwelling (2) with the intent to *therein* (3) break or enter a building (4) with the intent to terrorize or injure an occupant. Logically, this result could only occur if a building is encompassed within a dwelling.[2] However, the evidence presented below did not support such an application of N.C.G.S. § 14-54(a1).

Viewing the evidence in the light most favorable to the State, sufficient evidence was not presented to support the inference that Defendant broke and entered the Ridenhours' residence with the intent to *subsequently break or enter another building within the residence* and therein terrorize the Ridenhours. As a result, Defendant's motion to dismiss should have been granted as to N.C.G.S. § 14-54(a1). *See Goldsmith*, 187 N.C. App. at 166, 652 S.E.2d at 340 (holding the defendant's motion to dismiss a charge of first-degree burglary should have been granted where the victim was pulled out of the home and robbed because no evidence was presented that the defendant intended to commit a felony *inside* the victim's home).

The trial court wrongly considered N.C.G.S. § 14-54(a1) to be a supported underlying felony for the first-degree burglary charge. Since the trial court based its conviction of Defendant solely on N.C.G.S. § 14-54(a1) as the underlying felony, which was unsupported by the evidence, we must reverse Defendant's first-degree burglary conviction.

B. Remedy

[2] When a defendant is indicted for a criminal offense, he may be convicted of the charged offense or a lesser included offense when the greater offense charged in the bill of indictment contains all of the essential elements of the lesser, all of which could be proved by proof of the allegations in the indictment. *State v. Weaver*, 306 N.C. 629, 633, 295 S.E.2d 375, 377 (1982), *overruled in part on other grounds by State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993). Generally, when vacating a conviction for first-degree burglary on motions to dismiss where the evidence of felonious intent was insufficient, we find "there was sufficient evidence to sustain a verdict of [the lesser included offense of]

2. According to N.C.G.S. § 14-54(c), " 'building' shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." N.C.G.S. § 14-54(c) (2019).

misdemeanor breaking or entering." *Goldsmith*, 187 N.C. App. at 166, 652 S.E.2d at 340; *see, e.g.*, *State v. Cooper*, 138 N.C. App. 495, 499, 530 S.E.2d 73, 76, *aff'd per curiam*, 353 N.C. 260, 538 S.E.2d 912 (2000); *State v. Dawkins*, 305 N.C. 289, 290-91, 287 S.E.2d 885, 886 (1982). Such an approach is appropriate here.[3] In finding Defendant committed first-degree burglary the trial court, as finder of fact, necessarily found that all elements of misdemeanor breaking or entering were satisfied. *See* N.C.G.S. § 14-54(b) (2019) ("Any person who wrongfully breaks or enters any building is guilty of a Class 1 misdemeanor."). Therefore, we remand for entry of judgment for misdemeanor breaking or entering and resentencing.

Additionally, although the trial court, as finder of fact, found all the elements of N.C.G.S. § 14-54(a1) to be met, we cannot remand for entry judgment upon this offense. Generally, "where the indictment does sufficiently allege a lesser-included offense, we may remand for sentencing and entry of judgment thereupon." *State v. Bullock*, 154 N.C. App. 234, 245, 574 S.E.2d 17, 24 (2002). *See State v. Nixon*, 263 N.C. App. 676, 680, 823 S.E.2d 689, 692-93 (2019) ("an indictment for one offense may permit a defendant to be lawfully convicted of lesser included offenses"). *See also Goldsmith*, 187 N.C. App. at 166, 652 S.E.2d at 340; *Dawkins*, 305 N.C. at 290-91, 287 S.E.2d at 886; *State v. Jolly*, 297 N.C. 121, 130, 254 S.E.2d 1, 7 (1979) (vacating judgment of first-degree burglary and remanding for entry of judgment on the lesser included offense of second-degree burglary where evidence was insufficient to prove the greater offense). However, where an offense is not a lesser included offense of the offense a defendant was indicted on and convicted of, we cannot remand for entry of judgment on such an offense. *State v. Williams*, 318 N.C. 624, 628, 350 S.E.2d 353, 356 (1986) ("It has long been the law of this State that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment."). N.C.G.S. § 14-54(a1) is not a lesser included offense of first-degree burglary and we cannot remand for entry of

3. We note that although "[f]elonious breaking or entering, N.C.[G.S. §] 14–54(a), is a lesser included offense of . . . burglary," the elements of felonious breaking and entering are not proven by Defendant's conviction of first-degree burglary. *State v. McCoy*, 79 N.C. App. 273, 275, 339 S.E.2d 419, 421 (1986). Like first-degree burglary, felonious breaking or entering requires a defendant to break or enter and subsequently intend to commit a felony or larceny therein. N.C.G.S. § 14-54(a) (2019) ("Any person who breaks or enters any building with intent to commit any felony or larceny therein shall be punished as a Class H felon."). Therefore, the same flaw in applying N.C.G.S. § 14-54(a1) to first-degree burglary is present in any application to felonious breaking or entering and we cannot remand for entry of judgment for felonious breaking or entering.

judgment on N.C.G.S. § 14-54(a1) based on Defendant's conviction of first-degree burglary.

"As a lesser included offense, 'all of the essential elements of the lesser crime must also be essential elements included in the greater crime.' " *State v. Hinton*, 361 N.C. 207, 210, 639 S.E.2d 437, 439-440 (2007) (quoting *State v. Weaver*, 306 N.C. 629, 635, 295 S.E.2d 375, 379 (1982)). "[T]wo crimes are separate and distinct only if *both* have a unique element or fact, one not shared with the other. If the elements of either crime are wholly contained in the other, then the two crimes are not distinct, and one is a lesser-included offense of the other." *State v. Edmondson*, 70 N.C. App. 426, 428, 320 S.E.2d 315, 317 (1984). Here, N.C.G.S. § 14-54(a1) and first-degree burglary each require unique elements. Unlike first-degree burglary, N.C.G.S. § 14-54(a1) requires the "intent to terrorize or injure an occupant of the building [broken or entered into]." N.C.G.S. § 14-54(a1) (2019). Unlike N.C.G.S. § 14-54(a1), first-degree burglary requires "(i) the breaking (ii) and entering (iii) in the nighttime (iv) into the dwelling house or sleeping apartment (v) of another (vi) which is actually occupied at the time of the offense (vii) with the intent to commit a felony *therein*." *Singletary*, 344 N.C. at 101, 472 S.E.2d at 899. Each offense has unique elements, which are not encompassed within the other's elements. Therefore, N.C.G.S. § 14-54(a1) is not a lesser included offense of first-degree burglary and we cannot remand for entry of judgment based on N.C.G.S. § 14-54(a1).

CONCLUSION

In light of the lack of sufficient evidence of first-degree burglary due to the erroneous consideration of N.C.G.S. § 14-54(a1) as the underlying felony, the trial court's ruling on the motion to dismiss the charge of first-degree burglary is reversed. We remand for entry of judgment on misdemeanor breaking or entering under N.C.G.S. § 14-54(b) and a new sentencing hearing.

REVERSED AND REMANDED.

Judge HAMPSON concurs.

Judge YOUNG concurs in result only.

STATE OF NORTH CAROLINA
v.
MICHAEL WILLIAMS YELVERTON, DEFENDANT

No. COA19-1123

Filed 17 November 2020

1. Rape—second-degree forcible rape—jury instructions—defense—"reasonable belief of" consent

In a trial for second-degree forcible rape, the trial court did not commit error, much less plain error, by not instructing the jury on the defense of consent where defendant's proposed theory, "reasonable belief of consent," or mistaken belief of consent, is not a cognizable defense to rape in this state and where substantial evidence was presented that the victim expressly did not consent to defendant's advances.

2. Constitutional Law—effective assistance of counsel—rape trial—failure to request jury instruction on defense of consent

In a trial for second-degree forcible rape, where defendant was not entitled to a jury instruction on the defense of consent because defendant's theory of "reasonable belief of consent" is not a cognizable defense to rape in this state and given the substantial evidence that the victim expressly did not consent to defendant's advances, his counsel was not ineffective for failing to request such an instruction.

Appeal by Defendant from judgment entered 30 May 2019 by Judge Cy A. Grant, Sr. in Beaufort County Superior Court. Heard in the Court of Appeals on 23 September 2020.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Karen A. Blum, for the State.

Mark Montgomery for Defendant-Appellant.

INMAN, Judge.

Michael Williams Yelverton ("Defendant") appeals from a judgment following a jury verdict finding him guilty of second-degree forcible rape. Defendant contends the trial court erred by not instructing on his "reasonable belief of consent" as a defense to rape. Defendant also claims he is entitled to a new trial because his counsel did not request

the same instruction. We hold that Defendant has failed to demonstrate reversible error.

I. FACTUAL & PROCEDURAL HISTORY

Evidence presented at trial tends to show the following:

Defendant and "Ivy"[1] were friends during high school but only started dating in 2017. Their sexual contact with each other had been limited to kissing and touching above the waist because Ivy "wanted to take it slow" and "was not ready" for anything more. Whenever Defendant did try to touch her below the waist, she told him to stop. Until August 2017, Defendant always respected Ivy's limits.

On 1 August 2017, Ivy visited Defendant at his home before picking up her brother from a car rental facility. At the time, Defendant's roommates were in the living room. Ivy went with Defendant into his bedroom and they began watching television. Their physical contact then became "hot and heavy." Defendant threw Ivy's phone aside, flipped her over, and began kissing her and touching her breasts. Defendant then removed Ivy's shirt as they continued "making out." Ivy was "okay" with all of this.

Defendant then attempted to put his hand down Ivy's shorts. She pushed him away and told him "no." Defendant removed his hand momentarily but made repeated attempts. Ivy twisted her legs to keep them together, but eventually Defendant was able to remove her shorts. She still had on her underwear. Ivy again told Defendant "no" and to stop because she "wasn't ready for that."

Defendant then pinned Ivy's hands over her head, pushed her underwear aside, and penetrated her vagina with his penis. Ivy told Defendant to stop and said "no," but Defendant continued to penetrate her. Eventually, Ivy gave up because Defendant did not listen. She did not yell or scream, she just "wanted it over with."

At some point Defendant stopped penetrating Ivy and she turned over to grab her phone to respond to text messages and calls from her brother. Defendant took her movement to mean that she "wanted more" and he tried to penetrate her from behind. Before he could, Ivy stood up, went into the bathroom, got dressed, and left the home. Defendant walked with her outside, asking if she was okay. Ivy told Defendant she was okay, but she felt disgusted. She left in her car to pick up her brother.

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1. We use a pseudonym for the adult victim of sexual crimes.

Defendant repeatedly texted Ivy after the incident and before she reported it to police. Minutes after Ivy left Defendant's home, he asked Ivy via text to promise him she was okay. Ivy responded, "I don't want to talk to you any more, Michael. I didn't want to do that. You wouldn't listen. I'm done." Defendant continued to text Ivy daily. At one point, Defendant asked Ivy why she turned over and did not object to his penetration, to which she replied, "did you not understand how I was trying to get out of there?" Defendant replied "Yes. I understand, and I'm sorry." Defendant later texted Ivy, "I hurt you badly, and I'm so ashamed of myself. I've never acted like that before." Ivy asked of Defendant, "Did I not keep trying to stop you, Michael?" to which he responded, "to an extent, yes." She wrote back, "Okay, but you knew I wasn't ready to have sex, right?" He replied, "yes, and I am sorry. I really am." Defendant made continued attempts to talk to and see Ivy, despite her pleas that he leave her alone.

Five days after Defendant forced himself on her, Ivy reported the incident to police. She was afraid to go to police on her own because she did not think she was strong enough. She did not want to talk about it and wanted to forget it happened. Ivy was also worried no one would believe her.

On 4 December 2017, a Beaufort County grand jury indicted Defendant on charges of second-degree forcible rape and attempted second-degree forcible rape. Defendant's case was called for trial on 28 May 2019.

At trial, Ivy testified, among other things, that before and on the date of the charged offenses, she had told Defendant she was not ready to have sex with him; that Defendant forcibly penetrated her vagina with his penis without her consent; and that Defendant attempted to penetrate her again from behind without her consent. The State also presented four witnesses to whom Ivy recounted being sexually assaulted—a friend Ivy spoke with minutes after leaving Defendant's home; Ivy's brother, whom she spoke with after reaching the rental car lot that night; and two other family members to whom Ivy reported the incident within the next several days.

Defendant testified that he thought Ivy consented to sex. Although he admitted Ivy stated "she was not ready" that night, he denied that she said "no" or "stop" multiple times, contrary to her testimony. Defendant did concede that "she may have pushed me a little bit" when he initiated sexual contact. Two of Defendant's roommates testified they did not hear any commotion or cries for help from the bedroom that night. They also testified that Defendant and Ivy walked out of the bedroom

holding hands, that Ivy did not seem upset, and Defendant and Ivy said goodbye at her car.

The trial court instructed the jury that the State must prove three things beyond a reasonable doubt for them to find Defendant guilty of second-degree forcible rape: 1) Defendant engaged in vaginal intercourse with Ivy, 2) Defendant used or threatened to use force sufficient to overcome any resistance Ivy might make, and 3) Ivy did not consent and it was against her will.

The jury found Defendant guilty of second-degree forcible rape and not guilty of attempted second-degree forcible rape. The trial court sentenced Defendant to a term of 60 to 132 months of imprisonment. Defendant gave notice of appeal in open court.

II. ANALYSIS

A. "Reasonable Belief" of Consent Defense to Rape

[1] Defendant argues that the trial court erred, or plainly erred, by failing to provide a jury instruction on the defense of consent based on Defendant's "reasonable belief" that Ivy consented to the sexual acts. We hold there was no error.

Defendant's counsel did not request an instruction on his reasonable belief that Ivy consented. Failure to request a jury instruction results in plain error review on appeal. *State v. Campbell*, 340 N.C. 612, 640, 460 S.E.2d 144, 159 (1995). As such, we review whether there was a fundamental error, establishing prejudice, that "had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)).

A trial court must "instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted). "Any defense raised by the evidence is deemed a substantial feature of the case and requires an instruction." *State v. Hudgins*, 167 N.C. App. 705, 708, 606 S.E.2d 443, 446-47 (2005) (citing *State v. Smarr*, 146 N.C. App. 44, 54, 551 S.E.2d 881, 887-88 (2001)). A jury instruction is required for a defense if there is substantial evidence of each element of the defense when the evidence is viewed in the light most favorable to the defendant. *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000). Substantial evidence is such evidence that a reasonable person would find sufficient to support a conclusion. *State v. Vause*, 328 N.C. 231, 236, 400 S.E.2d 57, 61 (1991). "Failure to instruct upon all substantive or material features of

the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989) (citations omitted).

Our General Statutes provide that:

> (a) A person is guilty of second-degree forcible rape if the person engages in vaginal intercourse with another person:
>
> (1) By force and *against the will of the other person*; or
>
> (2) Who has a mental disability or who is mentally incapacitated or physically helpless, and the person performing the act knows or should reasonably know the other person has a mental disability or is mentally incapacitated or physically helpless.

N.C. Gen. Stat. § 14-27.22(a) (2019) (emphasis added). "[A]gainst the will of the [person]" means "without [their] consent." *State v. Carter*, 265 N.C. 626, 630, 144 S.E.2d 826, 829 (1965). "Consent by the victim is a complete defense [to rape], but consent which is induced by fear of violence is void and is no legal consent." *State v. Alsto*n, 310 N.C. 399, 407, 312 S.E.2d 470, 475 (1984); *see also State v. Smith*, 360 N.C. 341, 344, 626 S.E.2d 258, 260 (2006); *State v. Moorman*, 320 N.C. 387, 389-92, 358 S.E.2d 502, 504-06 (1987).

Defendant asserts that the trial court should have provided the jurors the following instruction on consent: "[I]f the defendant reasonably believed that the complainant was consenting to intercourse, [the jury] should return a verdict of not guilty." This Court has not recognized Defendant's proposed variation on the consent defense—a "reasonable belief of consent."[2] Nor has the North Carolina Supreme Court recognized such a defense. In *State v. Moorman*, our Supreme Court held that a defendant could be convicted of rape by force and against the will of the victim, who was incapacitated and asleep at the time, despite the defendant's testimony that he mistook the victim for someone he knew and believed she consented to vaginal intercourse. *Moorman*, 320 N.C. at 389-92, 358 S.E.2d at 504-06.[3]

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2. In an unpublished opinion, this Court expressly rejected this theory of defense to a rape charge. *State v. Gallegos*, No. COA16-1058, 2017 WL 3255195, at *2-3 (Aug. 1, 2017 N.C. Ct. App.) (rejecting a defendant's argument that his "reasonable belief" that the alleged victim was consenting should be recognized as an affirmative defense to rape).

3. The *Moorman* Court nonetheless overturned the defendant's rape conviction and awarded him a new trial on the grounds of ineffective assistance of counsel. *Moorman*, 320 N.C. at 402-03, 358 S.E.2d at 512.

The General Assembly has used language of reasonableness in other portions of our General Statute's Article 7b on "Rape and Other Sex Offenses." The legislature defines revocation of consent as "that [which] would cause a *reasonable person* to believe consent is revoked" under the article's definition section. N.C. Gen. Stat. § 14-27.20(1a)(b) (2019) (emphasis added). In the second-degree forcible rape provision, when considering a victim's mental disability, incapacitation, or physical helplessness and their ability to engage in consensual intercourse, "the person performing the act [must] know[] or should reasonably know the other person has a mental disability or is mentally incapacitated or physically helpless" to be guilty of rape. *Id.* § 14-27.22(a)(2).

Consistent with the statutory language and our Supreme Court's holding in *Moorman*, we reject Defendant's argument that he was entitled to a jury instruction that he would not be guilty of rape if he mistakenly believed Ivy consented to vaginal intercourse. Because a defendant's knowledge of whether the victim consented is not a material element of rape and we have not recognized mistaken belief in consent as a defense to rape, the trial court did not err in failing to provide an instruction to that effect.

To support his argument for the defense of "reasonable belief of consent," Defendant relies on North Carolina Rule of Evidence 412(b)(3), which allows the admission of evidence of

> a pattern of sexual behavior so distinctive and so closely resembling the defendant's version of the alleged encounter with the complainant as to tend to prove that such complainant consented to the act or acts charged or behaved in such a manner as to *lead the defendant reasonably to believe that the complainant consented.*

N.C. Gen. Stat. § 8C-1, Rule 412(b)(3) (2019) (emphasis added). Defendant contends that this Court—through its application of Rule 412(b)(3)— recognized a defendant's reasonable belief in consent as a defense to rape in *State v. Ginyard*, 122 N.C. App. 25, 468 S.E.2d 525 (1996). We did not. In that case, this Court rejected the defendant's contention that he had a reasonable belief complainant consented to sex based on evidence of one prior consensual sexual encounter between complainant and two other men establishing "a distinctive pattern of sexual behavior [ ] relevant to the issue of consent" in his case. *Id.* at 32-33, 468 S.E.2d at 530 (citing *State v. Fortney*, 301 N.C. 31, 41, 269 S.E.2d 110, 116 (1980)). *Ginyard* is inapposite not only on its facts, but because Rule 412 concerns the admissibility of evidence at trial, not a substantive defense.

In this case, evidence of Ivy's past sexual behavior showed that she had *denied* consent to Defendant in every preceding encounter between them, telling him to "stop," that "she was not ready," and she "wanted to take it slow." This evidence, even when viewed in a light most favorable to Defendant, simply cannot support his claimed "reasonable belief" that Ivy consented to sexual acts on 1 August 2017. Defendant's argument that he believed Ivy consented to vaginal intercourse that night because he was able to achieve that goal simply underscores Defendant's mistake of law, not of any fact.

In *State v. Alston*, our Supreme Court held the State presented substantial evidence of non-consent when the victim "testified unequivocally that she did not consent to sexual intercourse" and told the defendant that she was not ready to go to bed with him immediately before penetration. *Alston*, 310 N.C. at 407-08, 312 S.E.2d at 475. Even when viewed in the light most favorable to Defendant, there was similar substantial evidence here that Ivy did *not* consent to sex with Defendant on 1 August 2017. Defendant admitted that Ivy said she "was not ready" that night and that Ivy "may have pushed him a little bit" in resistance to his sexual advances. Ivy said "no" to Defendant's advances when he put his hand down her pants. She said "stop" again before Defendant proceeded to remove her pants and penetrate her while forcibly holding her hands above her head.

The trial court properly instructed the jury on the second-degree forcible rape charge itself. In *State v. Rhinehart*, this Court upheld a similar jury instruction, reasoning that it was "clearly sufficient to convey the [substance of] defendant's request for a charge that consent is a defense to the crime of rape." 68 N.C. App. 615, 619, 316 S.E.2d 118, 121 (1984). Unlike the defendant in *Rhinehart*, in this case Defendant did not even request a consent defense instruction at trial.

The trial court was not required to give an instruction on the defense of consent based on Defendant's mistaken belief because this Court does not recognize such a defense and the evidence did not warrant an additional instruction. Defendant has failed to demonstrate error, much less plain error.

B. Ineffective Assistance of Counsel Claim

[2] In the alternative, Defendant argues he has been denied his right to effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed. 2d 674 (1984), because his defense counsel did not request an instruction on Defendant's reasonable belief of consent defense. Because we have already concluded that Defendant was not

entitled to such an instruction, we conclude that Defendant was not denied the right to effective assistance of counsel.

III. CONCLUSION

Defendant has failed to demonstrate error, let alone plain error, in the trial court's failure to instruct the jury on "reasonable belief of consent" as a defense to the rape charge. Since Defendant's ineffective assistance of counsel argument relies upon counsel's failure to request the same instruction, that argument also fails.

NO ERROR.

Judges DILLON and YOUNG concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 NOVEMBER 2020)

BATTLE v. O'NEAL No. 19-1036	Mecklenburg (18CVD21550)	Affirmed in Part; Reversed and Remanded in Part
BRADLEY v. BRADLEY No. 20-48	Onslow (14CVD109)	Remanded
CHICA v. CHICA No. 19-856	Wake (16CVD9327)	Affirmed
GRIBBLE v. MADCAT ENTERS., INC. No. 19-1092	Mecklenburg (17CVS14721)	Affirmed
McSWAIN v. INDUS. COM. SALES & SERV., LLC No. 20-26	N.C. Industrial Commission (14-002870)	Dismissed
N.C. STATE BAR v. PHILLIPS No. 19-1093	Wake (18CVS5645)	Affirmed
STATE v. ALSTON No. 20-141	Wilson (18CRS52943)	Affirmed
STATE v. ANTHONY No. 18-1118-2	Rowan (17CRS51350) (17CRS51353) (17CRS51412) (17CRS51470) (17CRS974)	Reversed
STATE v. BEHAR No. 19-1158	Buncombe (18CRS84420) (18CRS84422-24) (18CRS84426)	Affirmed
STATE v. BRIMMER No. 19-1103	Onslow (17CRS57635)	No Error In Part; No Plain Error In Part.
STATE v. BROWN No. 19-983	Davidson (17CRS1409) (17CRS52490) (18CRS2469)	No Error
STATE v. ELLIOT WRIGHT No. 20-272	Duplin (18CRS51760)	Judgment vacated; Remanded for Resentencing.

STATE v. HUNTLEY No. 20-92	Mecklenburg (18CRS18332)	No Error
STATE v. MATTHEWS No. 19-1168	Cumberland (17CRS51855-56) (19CRS1066)	No Error
STATE v. MELTON No. 20-257	Jones (16CRS50395-97)	No Error
STATE v. RAHMAN No. 19-928	Robeson (16CRS50686)	No Error
STATE v. REDD No. 19-935	Forsyth (17CRS55799-800)	Affirmed
STATE v. WILLIAMS No. 20-209	Onslow (17CRS57968)	Reversed and Remanded
STATE v. WILLIS No. 20-260	Rutherford (18CRS53536) (18CRS53538) (19CRS341)	Vacated and Remanded
TAYLOR v. VAUGHAN No. 19-886	Beaufort (18CVS116)	Affirmed

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